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IN THE

Supreme Court of the United States.

UNITED STATES, *Complainant and Appellant,* *vs.* *KATE D. McLAUGHLIN, Administratrix, etc., et al.,* *Defendants and Appellees.*	*No. 1027.* *October Term,* *1887.*

And six other suits entitled:

United States vs. Cent. P. R. R. Co., et al.
United States vs. Cent. P. R. R. Co., et al.
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United States vs. Cent. P. R. R. Co., et al.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE STATE OF CALIFORNIA.

Brief on Behalf of Appellant.

A. H. GARLAND, Attorney General,
Solicitor for Appellant.
MICH. MULLANY AND
D. M. DELMAS,
Special Counsel for Appellant.

Filed *1887,*

JAMES H. McKENNY, Clerk.

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UNITED STATES,
Complainant and Appellant.
vs.
KATE D. McLAUGHLIN, ADMINISTRATRIX, ETC., ET AL.
Defendants and Appellees.

OCTOBER TERM 1887. No. 1027.

And six other suits submitted on the testimony taken in the above entitled suit, and which are entitled:

United States vs. Cent. P. R. R. Co., et al.
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United States vs. Cent. P. R. R. Co., et al.

Brief on Behalf of Appellant.

The patents sought to be cancelled by these seven suits were issued on the following dates, viz:

In suit No. 3607, patent issued on Nov. 23d, 1875.
In suit No. 3609, patent issued on Feb. 23d, 1874.
In suit No. 3610, patent issued on July 21st, 1881.
In suit No. 3611, patent issued on June 6th, 1879.
In suit No. 3612, patent issued on Nov. 25th, 1871.
In suit No. 3613, patent issued on April 3d, 1872.
In suit No. 3614, patent issued on April 9th, 1870.

The suits are referred to by their numbers in the Circuit Court; the first mentioned, No. 3,607, is now No. 1,027 in this Court.

The lands involved are located in ranges 5, 6, 7, 8, 9, and some in the westerly part of 10, north and east of Mount Diablo Base and Meridian, and between the Moquelumne and Calaveras rivers in San Joaquin and Calaveras counties, in the State of California.

It became necessary to bring seven separate suits in this "Moquelamos Grant Case," *i. e.*, one suit to cancel each separate patent; because it was found that there was one, or more than one, party claiming under each patent who did not claim under any of the others. But it has been understood by the counsel engaged on each side, that the seven suits constitute but one suit in fact; and in accordance with that understanding a stipulation has been entered into in each of the six suits numbered 3609 to 3614, inclusive, to the effect that each of these six suits should be submitted for decision upon the evidence adduced in suit No. 3607, except as to the patent sought to be cancelled by each separate suit; and as to that, it has been covered by another stipulation, as will hereafter appear. So that, when the testimony was all taken in the suit No. 3607, the time for taking testimony in each of the other six suits was permitted to lapse. Hence all of the seven suits are now before this Hon. Court for decision on the testimony taken in suit No. 3607; in addition, of course, to the stipulations entered into in each separate suit, and now on file. And herein,

A statement of facts was settled, signed and filed in each of the seven suits, which, after settling, and disposing of, all

preliminary and formal matters in each particular suit, not common to all of the others, the following general and material facts, which are common to all, have been settled and admitted by all parties to each suit, viz:

"1. That all of the persons named in said complainants' bill of complaint herein as defendants are citizens and residents of the State of California, except said George D. Wise, James M. Wise, Peyton Wise, Frank M. Wise and Louis W. Wise, who are citizens and residents of the State of Virginia.

"2. That on the 13th day of December, 1883, Charles McLaughlin died in the City and County of San Francisco, State of California, he being then a resident thereof, and leaving a will, which was by him made, executed and published in his lifetime.

"On, to wit: the 16th day of June, 1884, an order of the Superior Court of said City and County of San Francisco was duly given, made and entered, admitting said will to probate and appointing defendant, Kate D. McLaughlin, sole executrix thereof. Thereupon she qualified as such executrix, and in pursuance of said order and qualification, on, to wit: the day and year last aforesaid, letters testamentary upon said will issued out of said Court to said Kate D. McLaughlin, appointing her executrix of the will aforesaid of said Charles McLaughlin, deceased; and she is now, and ever since the issuance of said letters has been, such executrix; and that Kate D. McLaughlin, widow of said decedent, is the sole devisee named in the said will of said Charles McLaughlin, deceased.

"3. That on the 12th day of May, 1884, Tully R. Wise died intestate, in the City and County of San Francisco, State of California, he being then a resident thereof.

"On, to wit: the 18th day of June, 1884, an order of the Superior Court of said City and County of San Francisco was duly given, made and entered, appointing defendant, John H. Wise, administrator of the estate of said decedent. Thereupon he qualified as such administrator, and in pursuance of said order and qualification, on, to wit, the day

and year last aforesaid, letters of administration upon the estate of said decedent, issued out of said Court to said John H. Wise, and he is now, and ever since the issuance of said letters has been, such administrator; and,

"That defendants, George D. Wise, James M. Wise, Peyton Wise, Frank M. Wise and Louis W. Wise, citizens and residents of the State of Virginia, and John H. Wise, aforesaid, are the heirs at law and the only heirs of said Tully R. Wise, deceased.

"4. That on the 28th day of June, 1861, the Central Pacific Railroad Company of California became, and thereafter until the 22d day of June, 1870, continued to be, a corporation, organized and existing under the laws of the State of California, for the purpose of constructing and maintaining a railroad and telegraph line from, at or near the city of San Francisco, in said State, to the eastern boundary line of said State, and under the name and style of "The Central Pacific Railroad Company of California."

"5. That on the 13th day of December, 1862, the Western Pacific Railroad Company became, and thereafter until the 22d day of June, 1870, continued to be, a corporation, organized and existing under the laws of said State of California, for the purpose of constructing and maintaining a railroad and telegraph line from the city of San Jose, in said State, to the city of Sacramento.

"6. That on, to wit: the 31st day of October, 1864, the Central Pacific Railroad Company of California assigned to the Western Pacific Railroad Company, its successors and assigns, the right and privilege to construct, own, maintain and operate the railroad and telegraph line from the city of San Jose to the city of Sacramento, in said State of California, with all the privileges and benefits provided for and conferred by said Act of Congress relating thereto; and said assignment was ratified and confirmed by the Act of Congress approved March 3d, 1865, amendatory of said Acts of Congress approved July 1st, 1862, and July 2d, 1864, hereinbefore mentioned.

"7. That on, to wit: the 22d day of June, 1870, said 'The Central Pacific Railroad Company of California' and 'The Western Pacific Railroad Company' became merged and consolidated under the name and style of the 'Central Pacific Railroad Company,' one of the defendants herein, and said Central Pacific Railroad Company has been since said 22d day of June, 1870, and is, a corporation organized and existing under the laws of said State, and has ever since been and is the successor in interest, and of all property, rights, railroads and franchises of said the Central Pacific Railroad Company of California and the Western Pacific Railroad Company.

"8. That on, to wit: the 22d day of September, A. D. 1852, one Andres Pico, since deceased, presented and filed his petition to and with the Board of Land Commissioners appointed under the provisions of the Act of Congress approved March 3d, 1851, entitled "An act to ascertain and settle private land claims in the State of California," in which petition he claimed in fee, as a grant by the Mexican Government, a certain tract of land situated in the said State and District of California and known by the name of "Moquelamos," for eleven square leagues of land, which he alleged in his petition was granted to him within the boundaries as described in the grant, made June 6th, A. D. 1846, by Pio Pico, the then Mexican Governor of California, by virtue of the authority in him vested; and said petition closed with a prayer to allow and confirm to him, the petitioner, Andres Pico, the said tract of land, as described in the grant made by the aforesaid Governor Pio Pico, with the boundaries as therein set forth, to wit: "Once sitios de ganado mayor en el rio de Moquelumnes, que linda al Norte con la orrilla sur de dicho Rio; al oriente con la Sierra inmediata; al Sur con el terreno de Señor Gulnak; y al poniente con los esteros de la playa"—eleven square leagues on the River Moquelamos, bordering on the north upon the southern shore of said river; on the east upon the adjacent *ridge of mountains;* on the south upon the lands of Mr. Gulnak; and on the west upon the estuaries of

the shore. That said petition was in the usual form of petitions to the Board of Land Commissioners for the confirmation of claims to land in California, founded upon grants made by the Mexican Government.

"9. That said Board of Land Commissioners proceeded to consider and determine the said petition and claim of the said Andres Pico, and on the 3d day of October, 1854, rendered a decree denying the application of said petitioner for a confirmation of his said grant of land, and rejecting his claim therefor.

"10. That afterwards, to wit: on the 11th day of June, 1855, the said claimant and petitioner, Andres Pico, appealed to and petitioned the United States District Court for the Northern District of California for a reversal of the proceedings and decision of the said Board of Land Commissioners, and prayed that the decree of rejection by said Board be reversed, and that the petitioner's claim to the said tract of land above described be declared valid, and that a decree be entered confirming the same to the petitioner, Andres Pico, in accordance with said alleged grant to him by the Mexican Government, as aforesaid; and the said District Court thereupon proceeded to hear, consider and review the said decision and decree of said Board of Land Commissioners and the petition of said Andres Pico; and at a stated term of said Court, held on the 24th day of April, 1857, made and entered a decree reversing the decree of rejection of said claim by the said Board of Land Commissioners, and adjudged and decreed that the claim of petitioner was valid, and confirmed the Moquelamos grant above described to the petitioner, Andres Pico, and defined the boundaries thereof as follows:

"The land, of which confirmation is hereby made, is of the extent of eleven square leagues and no more, and is known by the name of 'Moquelamos,' and is situate on the River Moquelamos, bordering upon the north upon the southern shore of said river; on the east on the adjacent ridge of mountains; on the south on the land of Mr. Gulnak; and upon the west upon the estuaries of the shore, as de-

scribed in the original decree and grant of the same by the Governor of California on the 6th day of June, 1846, a copy of which is on file in the Transcript in this case."

"11. That thereafter the United States appealed from said decree of confirmation to the Supreme Court of the United States; and at the December term, 1859, of said Court, the aforesaid decree of confirmation of said District Court was, by the Supreme Court of the United States, reversed, and the case remanded with directions to have further evidence taken in the cause and claim of said Andres Pico, for said Mexican grant, Moquelamos.

"That thereafter the said District Court proceeded to take further evidence in said case, and after such further evidence was taken the case was again brought before said District Court for hearing, and by that Court a decree was entered, on the 4th day of June, 1862, adjudging the claim of the petitioner to be invalid, and rejecting the same.

"That thereafter, on, to wit: the 15th day of October, 1862, the petitioner, Andres Pico, appealed to the Supreme Court of the United States from said decree of said District Court rejecting his claim as invalid.

"That a final hearing of said cause was had before said Supreme Court; and, on the 13th day of February, A. D. 1865, a judgment was made and entered by said United States Supreme Court affirming said decree of the United States District Court rejecting the claim of said Pico, and adjudging the same to be invalid.

"13. That all of the lands included within the boundaries of said alleged Moquelamos grant, above described, lie in said State, and lie on each side of the road of said the Western Pacific Railroad Company, and opposite thereto in its course from said city of Sacramento to said city of San Jose.

"14. That under and by virtue of the Act of Congress, approved July 1st, 1862, entitled: 'An Act to aid in the con-'struction of a railroad and telegraph line from the Mis-'souri River to the Pacific Ocean, and to secure to the Gov-'ernment the use of the same for postal, military and other

'purposes,' and the Act amendatory thereof, approved July 2d, 1864, commonly known as the Pacific Railroad Acts, the Central Pacific Railroad Company of California was authorized to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, to the eastern boundary of said State of California, and under and by virtue of said Acts of Congress there were granted, for the purpose of aiding in the construction of the road and telegraph line of said the Central Pacific Railroad Company of California, ten alternate sections of the public lands of the United States, on each side and within twenty miles of the road of said Company, designated by odd numbers, not sold reserved or otherwise disposed of by the United States, and to which a homestead or pre-emption claim might not have attached at the time the line of the road of said Company should be definitely fixed.

"15. That the said Railroad Company filed its assent to said Central Pacific Railroad Acts at the time and in the manner in said Acts provided.

"16. That on, to wit: the 23d day of December, 1864, the Secretary of the Interior of the United States ordered all of the public lands not then sold, reserved or otherwise disposed of, within the limits of twenty-five miles on each side of the route or line of the road of said Railroad Company to be withdrawn from pre-emption, private entry and sale, in accordance with the provisions of said Acts of Congress, for said Railroad Company; and said order was thereupon transmitted to the Register and Receiver of the United States Land Offices at Stockton, San Francisco, and Sacramento, State of California, and received by them on the 31st day of January, 1865.

"17. On the 29th day of September, 1866, the President of the Western Pacific Railroad Company made out and filed with the United States Surveyor-General of the State of California, the verified statement, provided for by Section 4 of said Act of July 1, 1862, and Sections 6 of said Act of July 2, 1864, showing the construction, completion and equipment by said Western Pacific Railroad

Company, of the most westerly twenty miles, viz: the twenty miles next northwesterly from the City of San Jose, of the railroad and telegraph line of said Western Pacific Railroad Company, in compliance with, and conformity to, the requirements and provisions of said Acts of Congress; and said Surveyor-General thereupon, at the request of said Railroad Company, notified the Commissioners designated and provided for by said Acts to examine said twenty miles of said road and telegraph line and report thereon, in accordance with the provisions of said Act of Congress; and on the 5th day of October, 1866, said Commissioners made their report and certificate to the effect that said twenty miles of road and telegraph line mentioned in the verified statement had been constructed, completed and equipped by said Railroad Company, as provided and prescribed in and by said Acts of Congress.

"Similar verified statements were made by the President of said Western Pacific Railroad Company, as follows: On April 28, 1869, for a section of the road beginning at the junction thereof with the road of the Central Pacific Railroad Company of California, at the American River Bridge, near Sacramento City, and extending thence southwesterly twenty (20) miles; also, on October 12, 1869, for a section of said road beginning at the westerly end of the last mentioned section, and extending thence southwesterly sixty-three (63) miles; also, on December 29, 1869, for a section of said road beginning at the westerly end of the last-mentioned section, and extending thence twenty and two-tenths (20 2-10) miles to the easterly end of the first-mentioned section of twenty miles, beginning at San Jose.

"That all of those statements were, upon their being made, filed with said Surveyor-General, and he did forthwith, upon the filing of each statement respectively, and at the request of said Company, notify said Commissioners. That said Commissioners did thereupon examine said sections of the said road, as aforesaid, said reports being made respectively, on the 29th day of April, 1869, and the 13th day of October, 1869, and the 6th day of January, 1870.

"That each of the four reports of said Commissioners was thereupon filed with the Secretary of the Interior, and he thereupon recommended the acceptance of the same, and the issue of the bonds, and patents for lands due on account of said sections of road, agreeably to the provisions of said Pacific Railroad acts; and thereupon the President of the United States approved the same, and ordered the Secretary of the Interior and the Secretary of the Treasury to carry the said recommendation into effect, the first of which approvals by the President of the United States was made on the 4th day of December, 1866, and the last on the 21st day of January, 1870. That the four sections above mentioned comprise the whole of said road from the City of San Jose to the City of Sacramento. That said road has been in full operation and has been operated for the transportation of passengers and freight since the 9th day of June, 1869.

"18. That, thereafter, there was issued on the said day of 18 , to said Pacific Railroad Company under the signature of the President of the United States, attested by the Recorder of the General Land Office, and under the seal of the General Land Office, what purported to be, and in form was, a patent."

[In each of the agreed statements the blanks of the paragraph are filled out to state the date of the patent and the name of the railroad to which issued.]

"That the patent was in the usual form of the patents issued by the United States to the several railroad companies, under and in pursuance of said Pacific Railroad Acts of Congress.

"19. That said patent described and purported to convey to said Railroad Company the several tracts of land mentioned and described in said bill of complaint.

"20. That all of said lands described in the bill of complaint herein are opposite to, and within the 25-mile limits on each side of, the route or line of said railroad company's

road, as laid down on the map filed by said Central Pacific Railroad Company of California, in the Department of the Interior, on the 8th day of December, 1864.

"21. That the respective defendants herein have, since the issuance and receipt of said patent mentioned in the bill of complaint herein, become the grantees, from and under said Pacific Railroad Company of all the title and interest, if any, which became vested in said Railroad Company, under and by virtue of said patent, for the respective tracts of land mentioned in their respective answers, or the schedules thereto annexed; or acquired a lien thereon; and the deeds of conveyance and other instruments under which the respective defendants became such grantees and lien-holders, from and under said Railroad Company, are sufficient in form and execution to pass such title and interest, if any, as became thus vested in said Railroad Company by virtue of said patent, or to create a lien upon the title to such tract or tracts.

"And if it is competent, material, relevant or admissable as evidence, it is also stipulated that the said defendants respectively paid a valuable consideration for the conveyances and liens which they obtained and acquired under said patent."

As a part of this agreed statement it is stipulated that the same may be read and used as evidence in each suit everywhere and at all stages thereof.

Under this agreed statement there remains but two facts to be shown by the complainant to entitle it to the relief prayed for in its bill of complaint herein, viz:

1st. That the lands involved are within the boundaries of the Moquelamos Grant, as described in the decree of the U. S. District Court, rendered on April 24, 1857, by which that Grant was allowed and confirmed to Andres Pico; and,

2d. That the grant of the odd-numbered sections of public land by Congress to the Railroad Co. was made and took effect before the Moquelamos Grant was finally rejected, viz: before February 13, 1865.

I.

All the lands involved in the seven suits at bar are within the boundaries of the Moquelamos Grant, so called, as the same is described in the decree of the U. S. District Court, rendered on April 24, 1857, by which that grant was allowed and confirmed to Andres Pico, and in the various other records exhibited here.

No controversy has developed hitherto as to the location of the north, west or south boundary of this grant. Many exhibits are, however, before the Court even as to each of these three boundaries. As to the Moquelumne River on the north, the exhibits show that it lies to the north of all the lands in controversy, and extends far enough to the east to accommodate the calls of the south and east boundaries, no matter where located. The location of the estuaries of the shore on the west are shown by "Exhibit C C C," "D D D," "E E E," and "F F F," and some others; and lies to the west of all the lands in controversy. The location of the south boundary of the Moquelamos grant is the north boundary of the Gulnac grant, and which is the Calaveras River, except in as far as Andres Pico and C. M. Weber, grantee of G. Gulnac, agreed to the contrary. But after the agreed line terminates in going eastward on the line between the two grants, the Calaveras River again constitutes the dividing line. And although much has been said about the location of the east line—*adjacent ridge of mountains*, or, in-*inmediata sierra*—its location, for all the purposes of these suits, presents no difficulty. The first range of mountains met with in going east from the estuaries of the shore between the Calaveras and Moquelumne Rivers, is as certainly east of all the lands in controversy as the Moquelumne River is north of them, or as the estuaries of the shore are west of them, or as the Calaveras River is south of them. And there is a range of mountains immediately to the east of the lands in controversy, of which what is known as Bear Mountain, forms a part.

There is no conflict in the evidence, nor is there any lack

of abundance of evidence, as to the location of this eastern boundary, as called for in the description of the grant. It is situated in Range 11 east. To this effect we will submit a few references to the testimony.

However strange it may seem to our learned friends, the counsel for defendants, the first pieces of evidence to which we will refer in this behalf are those introduced by defendants themselves, viz:

1st. The map of San Joaquin County in its clean and proper condition; and,

2d. The same map in its condition prepared for this case by defendants. This map, in its double aspect, is marked "Exhibit 20" and "Exhibit 18," respectively. San Joaquin County is perhaps the most level county in California; it has no hills worthy of the name, or of being noted on the map, except over the southern part of Tulare Township on what is called the "West side," *i. e.*, west of the San Joaquin River, in the corner of the county which borders on Alameda, Santa Clara and Stanislaus Counties. Even in this corner the hills are but low ones—certainly they are not sierras or mountains. However, these low hills are marked and colored on the map, "Exhibit 20;" but none are marked elsewhere in the county. There is no more indication of hills on this map east of the Jack Tone Road (line between 7 and 8 E.), and between the Calaveras and Moquelumne Rivers than there is on the swamp and overflowed lands northwest of the City of Stockton. In fact, there are no hills—much less mountains—in any part of the county, except the few low hills in the southerly part of Tulare Township. "Exhibit 18," which is the same map, but prepared for this case and for the witnesses who testified with reference to it, is painted in a semi-circular manner from the Calaveras River on the south, to the Moquelumne River on the north, so as to give it the appearance of having hills east of this painted line. But it will be observed that the S. J. & S. N. R. R. runs *straight* through this pretended hilly country—in fact, straighter than it runs down near the "estuaries of the shore;" and it will also be observed that a country road

runs *straight* in a diagonal course over the public surveys from the place of Messrs. Bailey & Carpenter on the south at the Calaveras River to the Moquelumne River on the north—some 12 or 13 miles—and its entire course lies through the alleged hilly country. The engineer and draftsmen who prepared this map have *entirely* overlooked the existence of those supposed hills, and gave no more indications of hills on their map east of this painted line than they did west of it; and the engineers of the railroad and county roads were not prevented by hills from running the lines of their roads straight. Neither railroads nor county roads can be run straight through a hilly country, much less through mountains.

3d. The United States plats of townships 3 and 4 north, range 8, east, show also that there are no hills in this range between the Moquelumne and Calaveras Rivers. They present not even an indication of a hill. These two plats are marked defendants' Exhibit "23" and "24."

4th. The field notes also of these same townships state that there are no hills there. These two pieces of evidence are marked defendants' Exhibits "35" and "36."

5th. The deposition of Mr. C. M. Webber, taken January 10, 1856, states that, "There would, from the description " (of the Moquelámos grant), be no difficulty in identifying " the boundaries. *The description I allude to is that contained " in the transcript of the record now on file in U. S. District " Court for the Northern District of California.*" He then explains about the agreed line between himself and Andres Pico. This witness testifies thus at an early time, and from personal knowledge. This deposition is marked "Exhibit 14."

6th. *Fifteen* out of the 40 exhibits introduced by defendants were presented solely for the purpose of showing that Mr. Ed. Stanly, now deceased, was attorney for Andres Pico, on September 22d, 1864. There 15 exhibits are numbered, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 13, 15 and 33.

And in addition to this, for the same purpose, the testimony of Judge John A. Stanly was also introduced.

The foundation being thus laid, defendants introduced, at last, a letter alleged to have been addressed by Messrs. Stanley and Hayes to the U. S. Surveyor-General for Cal., on September 22, 1864. It is marked "Exhibit 9." The purpose for which this document was offered in evidence was not stated; so we are still in the dark as to the *purpose* for which it is before the Court. But, if it is competent or admissable at all, it is useful for complainant, *not* defendants. It says: "You will please take notice that the land herein-"after described, and which is located in the State of "California, is claimed under a grant from the Mexican "Government made to Andres Pico, * * and that said "claim has been appealed to the Supreme Court of the "United States in a certain proceeding, entitled, Andres "Pico vs. the United States, and is *now* pending therein "and undetermined.

"That said land lies on the Moquelumne River, in what "is now the County of *Calaveras*, and *includes and covers* the "land embraced in" (here follows a description of certain townships in said ranges), "and which are not subject to "pre-emption entry until final determination" of the claimed grant. "Said claim is known in the District Court of the "United States for the Northern District of the State of "California as case numbered one hundred and eighty-four "(184), *and to which reference is hereby made for a more par-"ticular description and information in regard thereto.*"

Assuming that the officer to whom this letter was addressed had authority to perform some official act in pursuance thereof, he was plainly informed that Andres Pico was *then* claiming the Moquelamos grant according to the boundaries set forth in the record of the cause in the U. S. District Court, and that the cause was then pending before the U. S. Supreme Court and undetermined, and that the claim *covered and included* certain designated townships, which, presumably, were then about to be disposed of by the Register of U. S. Land Office at Stockton in disregard of Andres Pico's

claim. This presumption is well sustained by the order of U. S. Surveyor-General to the Register at Stockton, dated September 21, 1864, concerning those very lands thus designated as being covered by this Mexican grant. This order is included in "Exhibit 9." It will also be observed that this notice of claim was given about the time the Cent. P. R. R. Co. of Cal. was surveying and fixing the line of its road, and only a little over four months before Pico's claim was finally rejected.

Passing away for the time being from the evidence thus furnished by defendants, and to which we refer as being substantially beneficial to complainant, we shall now make reference to some of the exhibits and testimony adduced by complainant on the subject under discussion, viz: the location of the adjacent ridge of mountains on the east and the topography of the country to the westward thereof.

In order that there shall be no mistake about the exact description of the boundaries of Moquelamos grant, as referred to by Messrs. Stanly and Hayes in their letter already mentioned, and as a supplement thereto, complainant put in evidence the original grant, in Spanish, which is marked "Exhibit W;" and the English translation thereof, which is marked "Exhibit X;" and the decree of the U. S. District Court confirming the grant, which is marked "Exhibit Y;" and the original grant, in Spanish, of the Gulnac rancho, which is marked "Exhibit H H H;" and the English translation thereof, which is marked "Exhibit I I I," (and the uncertainty of the description of this grant in its early condition has been mentioned); and the petition of Andres Pico to the Board of Land Commissioners for the allowance and confirmation of the Moquelamos grant in *Calaveras* County, which is marked "Exhibit K K;" and the mandate of the U. S. Supreme Court directing a reversal of the judgment of affirmance by the U. S. District Court, and remanding the cause for further evidence, which is marked "Exhibit L L L;" and the order of the U. S. District Court that the mandate be filed, which is marked "Exhibit M M M."

It is admitted, as well as proved, in the records that all the lands in controversy lie to the east of the estuaries of the shore, and lie between the Calaveras and Moquelumne Rivers. So, in order to reach the mountains on the east, we shall proceed eastward from the estuaries of the shore; and in order to establish the topography of this district of country, the public surveys thereof, with field notes and general descriptions are, perhaps, entitled to the first rank as evidence. These surveys were not made or intended for this case, and are entitled to full credit.

The plats of township 2, 3 and 4 in range 8, are marked Exhibits "W W" "Y Y" and "A A A;" and the field notes of these plats are marked Exhibits "X X," "Z Z," and "B B B."

There are no hills mentioned on any one of these three plats, or in the field notes thereof; and the public roads are laid out upon them in straight lines for long distances. There is no mention made upon or in them of even a hill. And this range (8) lies to the east of the "Jack Tone Road" so called.

The plat of township 3, range 9, is marked "Exhibit F F," and the field notes thereof are marked "Exhibit G G." There is no indication on this plat of even a hill on the face of the township, and seldom are even undulations mentioned in the field notes thereof.

In 1883, A. B. Beauvais, U. S. deputy surveyor, surveyed four sections of the northeast portion of township 3 north, range 9 east, and the following is the general description he gave of the land he had surveyed (see "Exhibit G G," page 51):

"The land in the four sections surveyed is rolling, the "soil being of *good second-rate quality*. Much of the surface "is covered with dense growth of chemisal and chapparal, "very difficult to survey. Timber is very scattering, being "white and live oak. All the land is claimed by *settlers* who "*re ide* thereon, and have small clearings, and are engaged "in clearing up the remaining portions."

The plat of township 4, range 9, is marked "Exhibit H H;" and the field notes thereof are marked "Exhibit I I." Across the face of this plat are the words "Land rolling and level;" and, "Agricultural Land." And seldom in the field notes are "rolling lands" or "low hills," etc., mentioned; and mountains are never mentioned.

The plat of township 3, in range 10, is marked "Exhibit K K;" and the field notes thereof are marked "Exhibit L L." This plat has endorsed upon its face, "Land rolling and hilly," and "Agricultural Land;" and hills are seldom mentioned in the field notes; but, of mountains, there is no mention.

The plat of township 4, range 10, is marked "Exhibit M M;" and the field notes thereof are marked "Exhibit N N." This plat has endorsed on its face, "Land mostly rolling and level;" and "Agricultural land;" and the field notes mention "level land," and "level bushy land," and "rolling land" very frequently, but seldom mention even hills; and, no mountains.

The plats of townships 3 and 4, range 11, are marked respectively, "Exhibit O O" and "Exhibit Q Q," and the field notes thereof are marked "Exhibit P P" and "Exhibit R R." It is in this range and in these two townships that we first meet *mountains*, and up to the foot of these mountains it is marked as "agricultural land," thus showing that the mountains are well defined and rise precipitately, thus forming a *ridge*.

Having met with and located the *adjacent mountains on the east* by means of the public surveys, we will turn to other evidence of the same fact, viz:

On February 18, 1879, the Hon. Commissioner of the General Land Office addressed the U. S. Surveyor-General for California, recommending that a survey and location of the east boundary of the Moquelamos Grant be made; and "With regard to the south boundary, which is the Rancho "Campo de los Franceses *in part*, you will consider the "Calaveras River as constituting the remainder of the said "boundary to a point opposite the adjacent mountains on

"the east," etc. This address is marked "Exhibit Z." What is known as the "Bond Survey" of the east boundary was made subsequent to this letter, but not according to the instructions contained therein.

On October 20, 1881, the Hon. Secretary of the Interior addressed the Hon. Commissioner of the General Land Office, to the effect that the Bond Survey did not locate the east line far enough east, and that the settlers were, on that account, harassed by the Railroad Company; that the line as located by Mr. Bond did not even go to the foothills; and he ordered the survey set aside, and directed that another survey be made. This order is marked "Exhibit A A."

On November 2, 1881, the Hon. Commissioner accordingly instructed the U. S. Surveyor-General to cause to be made the new survey thus ordered. This order is marked "Exhibit B B."

This new survey was accordingly made by Mr. A. W. Von Schmidt in February, 1882, and it was delineated on the same map with the Bond Survey, but Mr. Von Schmidt located his line a little east of where Mr. Bond located his line, and then placed the Sierra Nevada mountains (on the map) where he ran his line on the plains (on the ground). This map of the two lines is marked "Exhibit E E."

On April 14, 1882, the Hon. Secretary of the Interior ordered this Von Schmidt Survey also set aside, because not far enough east, and because it did not locate the line where it ought to be located, viz., at the foot, or base, of the mountains.

On May 8, 1882, the Hon. Commissioner of the General Land Office addressed the Hon. Secretary in response to the letter "Exhibit C C," and in which he says, in substance, that it appears that Mr. Von Schmidt located the east line through the middle of townships 3 and 4 N., range 9 E., a little east of the Bond Survey (of 1879) for the general average line, "the *plains* rising so gradually as to make almost "imperceptible what constitutes the foot of the mountains;" that he did not go far enough east to go to the foot of Bear Mountain, but went along small hills in range 9 east, be-

tween which and Bear Mountain the land is table, rolling and valuable as agricultural land. This communication was based on the inspection by the Hon. Commissioner of the public records of his office, and his observations are full of intelligence and accuracy on the subject in hand. It is marked "Exhibit D D."

It is admitted in the record that no survey of the east line of the Moquelamos Grant has been ordered or made since the Von Schmidt Survey just mentioned was set aside.

So far as to *new* surveys of this grant. Next, as to supposed *old* surveys thereof, we have shown that none was ever made. To this effect we have in evidence a letter of the Register of the U. S. Land Office at Stockton, Cal., to the U. S. Surveyor-General for Cal., dated September 14, 1870, stating that the Hon. Commissioner of the General Land Office desired to be furnished with a diagram of this grant, and asking for some information and assistance in furnishing the same, and that he (the Register) had never seen any map or diagram of the grant. This letter is included in "Ex-" hibit P P."

Also the reply of the U. S. Surveyor-General to the last letter, dated September 16, 1870, to the effect that the Moquelamos grant never reached the status of a survey in his office, and that he could give no assistance in furnishing the desired diagram to the Hon. Commissioner. This reply is marked "Exhibit T T T."

A letter written from the office of Messrs. Smith & Kenisston (attorneys in this suit for defendants) on May 23, 1883, to the U. S. Surveyor-General, asking for information as to he existence of a supposed old survey, and as to whether at Mr. Drew, the supposed maker thereof, was ever a U. S. Deputy Surveyor, and as to whether Mr. J. P. Brodie, as agent for Andres Pico, ever limited the grant to a mile west of range 8, east, etc. This letter is included in "Exhibit "P P P."

The reply to the last-mentioned letter, by the U. S. Surveyor-General, on May 14, 1883, shows that Mr. Drew never was a deputy U. S. Surveyor, and that there was no evi-

dence in his office that any survey had ever been made of the Moquelamos grant, or that Mr. J. P. Brodie ever had anything to do with the Moquelamos grant. This letter is included in "Exhibit P P P."

This brings us to the *oral* testimony of the location of the first range of mountains to be met with going east from the "estuaries of the shore," between the Calaveras and Moquelumne Rivers, and of the topography of the country, until this mountain is reached.

To elucidate this oral testimony, we have placed before the Court a diagram of the entire country within which are located all the lands in dispute. It is marked "Exhibit S S."

Although the learned counsel for defendants made some legal objection to its use as an exhibit when it was offered as such, they have, nevertheless, both from choice and necessity, been compelled to make constant reference to it for a thorough understanding of, not only complainant's testimony, but of defendants' as well; and it has proven itself correct in every detail which it represents. It shows every piece of land, every owner and possessor, every town, corral, county road, railroad, school-house, creek, etc., to Bear Mountain, over the entire country in which are situated all the lands involved in these suits. Furthermore, its correctness has been testified to and not questioned. (p. 20.)

The topography and character of this country, from the Calaveras to the Moquelumme Rivers and from the "estuaries of the shore" on the west to the foot of the adjacent ridge of mountains (Bear Mountain) on the east, has been described very fully and particularly, on the part of complainant, by *sixteen* disinterested witnesses, and by over *eighty* interested witnesses. When the fifth disinterested witness—Mr. J. H. Peters—had given his testimony, the learned counsel in charge of the defense stipulated that all the other witnesses would testify to the same effect as those five had done, and that each of the others would testify as to the character of his own locality as each of these five had testified as to his locality, respectively. (Record pp. etc.) The reason we had for calling so many witnesses on

this subject is, that every piece of land from range 7 eastwardly to the mountain should be described for the Court, as well as the lands surrounding each piece. Hence this multitude of witnesses were taken up indiscriminately from all over this locality to and including range 11 at the foot of Bear Mountain. And the country is so thoroughly and minutely described, and the *machinery* by which the whole country is *plowed and harvested* by the farmers using it is so fully expressed and described that we trust the Court will not be at a loss for information on the subject. But we fear it would be impossible for us to give the Court any true or comprehensive idea of the testimony given by those witnesses through the medium of this brief; and however much we regret the work it will entail to the learned Chief Justice and Justices whom we have the honor to address, the testimony cannot be properly understood without reading it through. It will be found, however, to be to the general effect that the first mountain met with is Bear Mountain, in range 11 east; and that all the land lying west of Bear Mountain is good, level and rolling agricultural land, over which, *it is admitted* by learned counsel for defendants, that the very heaviest and largest agricultural machinery is used in putting in and taking off the grain crops raised thereon. It is admitted that *harvesters, headers, gang-plows, steam-threshers,* and such like machinery are used in the cultivation of every foot of this country over to Bear Mountain—certainly beyond the eastern line of the Railroad grant.

Indeed, the defendants have not attempted to question the fact that the first mountain to be met with going east is Bear Mountain, and is met with in Range 11 east; and that the country lying west of this mountain is a good agricultural country, rolling and undulating in places, but level in the main, and worked by the farmers occupying it, with the heaviest and most cumbersome machinery used only on the most level plains in California, and used here without trouble or inconvenience. Of course, there can be no pretense that such machinery can be used even on hills. The country is, in places, undulating, but generally level. In this

behalf, the defendants contented themselves altogether with an inquiry for *hills* throghout this country; and the location of their main inquiries was around the town of Wallace, in Calaveras County, where some of their witnesses *supposed* there were hills from 50 to 75 feet high. There had been so many inquiries made about the so-called hills in the neighborhood of Wallace, that the complainant procured an actual measurement of the elevation of the highest of them, and they proved to be some 40 feet, a little more or less, above the greatest depressions in their neighborhood, and rising so very slowly that they should be properly denominated *undulations*, not hills.

The San Joaquin and Sierra Nevada R. R. has been built recently through the track of country between the Calaveras and Moquelumne Rivers, and far enough from each river to give it great credit as a standard of the elevation of this country all the way from tide-water to a station named Burson, *which is east of the east line of the railroad grant.* The superintendent of this road, Mr. Washburn, has furnished this elevation. Brack's Station is at tide-water. Lodi, on the line of the Cent. P. R. R. is 13 miles east of Brack's; and Burson is $22\frac{7}{10}$ miles east of Lodi, and $35\frac{7}{10}$ miles east of Brack's. The elevation over this distance is: at Brack's, 0; at Woodbridge, $10\frac{8}{10}$ miles, 48 feet; at Lodi, 13 miles, 50 feet; at Lockeford, $20\frac{3}{10}$ miles, 108 feet; at Clement's, $24\frac{1}{10}$ miles, 136 feet; at Wallace, Calaveras Co., $30\frac{3}{10}$ miles, 200 feet; at Burson, $35\frac{8}{10}$ miles, 415 feet; and at Valley Spring, $39\frac{7}{10}$ miles; 675 feet. The road was constructed as far as Valley Spring's station in 1883-4, and has not since been continued further.

It will be seen that the elevation from Brack's to Burson, $35\frac{7}{10}$ miles, is 415 feet, and is pretty evenly distributed over the entire distance. It is between 11 and 12 feet to the mile. It is hardly, if at all, discernible to the natural vision; and there are many persons in possession of good visual organs and powers of accurate observation who might guess this slight and gradual elevation to run in the direction contrary to how it actually does run, if the

location of the tide-water or the current of streams was unknown.

Mr. R. C. Hopkins was placed on the stand by *defendants* as an expert on Spanish and Mexican grants generally, and having explained much about the terms and manner of descriptions used in the designation and boundaries of such grants, and having also explained the distinction between *sierra* (mountain), and *loma* (hill), and *lomas bajas* (low hills), and *lomaria* (range of hills), he gave the following answer to the following question:

Q.—"Where a range of mountains terminated in the "plains by a succession of low hills, and it was the in- "tention of the government to grant a tract of land which "terminated with the first rising ground, was it not the "custom to use as descriptive terms of the boundary the "words, 'lomas,' or 'lomas bajas,' or 'lomaria,' and not "the word 'sierra'?"

A.—"Yes, sir; by 'lomas' or 'lomaria'."

This answer, *of itself*, cuts away from defendants all pretense to a defense based upon the location of the east boundary of the Moquelamos grant.

U. S. vs. Fossat, 1 *Hoffman R.* 211.
id. *id.* 376.
id. 20 *How. U. S.* 413.
id. 21 *id.* 445.

Defendants have placed in evidence four certificates of the Register of the U. S. Land Office at Stockton. They are marked Exhibits 25, 38, 39 and 40. The first named is to the effect that the records of that office show that prior to February 13, 1865, there were State Selections, etc., made of lands east of the range line between ranges 7 and 8. The second, third and fourth named are to the effect that the records of that office show that no entries of public lands were made under either the homestead or pre-emption laws in T. 4 N., R. 5 E., or in that portion of T. 2 N., R. 7 E., north of the Calaveras River, or in that portion of T. 4 N.,

R. 7 E., south of the Moquelumne River, between September 24, 1864, and November 27, 1865.

It is hard to see what purpose this testimony subserves. Whether or not any person desired to homestead or preempt any of the land thus designated between these two dates is entirely immaterial. In fact, none of the land which lies between the Moquelumne and Calaveras Rivers was legally subjected to settlement by homestead or preemption settlers until released from Andres Pico's claim on February 13, 1865. And that persons saw fit to make State selections, etc., east of the range line between ranges 7 and 8, did not to any extent release it from Andres Pico's claim.

But, it seems that the State selections, etc., were made as freely west of this oft-mentioned range line (between 7 and 8) as east of it. This is shown by complainants' "Exhibits R R R" and "S S S."

We have never yet been able to ascertain why the range line between 7 and 8 should receive any more mention in this suit for any purpose than any other line from the estuaries of the shore to Bear Mountain. If any range line should receive special mention for approximation to the eastern boundary of the Moquelamos Grant, it is the line between ranges 10 and 11, although even that line is not quite far enough east; but it is outside of the Railroad grant limits, and thereby discussion ends as to the exact line of the Moquelamos grant on the east. But the line between ranges 7 and 8 lies confessedly upon the plains of the San Joaquin valley; and even the nearest easterly undulations are miles away. Neither does this line (between ranges 7 and 8) correspond with the northeasterly corner, or with the easterly line, of the Gulnac Grant, either as finally surveyed or unsurveyed. And no one claims that any *sierra inmediata* was seen at any time down on the plains at that line. In short, it seems to us that this line has played the part of a *delusion* to the defense throughout a large part of the trial herein. And it is submitted, with great respect, that the observations of the learned Judge of the Circuit Court con-

cerning this line (between ranges 7 and 8) have no point or application in view of the facts, the testimony, and the descriptive call of the eastern boundary of the Moquelamos Grant. We say *observations* of the learned Judge, because he has not decided that this *artificial* line between ranges 7 and 8 bears any relation or proximity to, or connection with, the *natural* monument, *i. e., the adjacent ridge of mountains*, which forms the easterly line of the Moquelamos Grant. It is, of course, unnecessary to say that this range line, like all other range lines of the public surveys, was run in utter disregard of the lines of the Moquelamos Grant, and of the grant itself.

II.

The grant of the odd numbered sections of public land by Congress to the Railroad Company was made and took effect before the Moquelamos Grant was finally rejected, viz: before February 13, 1865.

A.

The words of the Act under which the railroad lands were granted are:

"That there be, and *is hereby* granted to the said company " * * every alternate section of *public* land, de- " signated by odd numbers, to the amount of ten alternate " sections per mile on each side of said railroad * * " not sold, reserved, or otherwise disposed of by the United " States, and to which a pre-emption or homestead may not " have attached at the time the line of said road is definitely " fixed."

Act of July 1, 1862, Sec. 3; 12 St., 492.
Act of July 2, 1864; 13 St., 358.

This act constitutes a grant *in praesenti* of *all* lands thereby granted, and none were thereby granted excepting *public* lands. The title vested by virtue of the Act of Congress itself as if it were in fact a direct conveyance of the sections

granted. So also, the Act of July 2, 1864, is to be considered as if passed on July 1, 1862, and as a part of the Act passed on the latter date.

Schulenberg vs. Harriman, 21 *Wall, R.*, 58.
Missouri Ry. Co. vs. Kansas Ry. Co., 97 *U. S. Rep.*, 497.
Van Wyck vs. Knevals, 106 *U. S. Rep.*, 370.
Wright vs. *Rosberry*, 121 *U. S. Rep.*, 488.
Railroad Co. vs. Baldwin, 103 *U. S. Reports*, 427.
Leavenworth, etc., R. Co. vs. U. S., 92 *U. S. Rep.*, 743.

In the words of this Court, speaking through MR. JUSTICE FIELD, *Missouri Ry. Co. vs. Kansas Ry. Co., supra:*

" In constructing a congressional grant, the Act by which " it is made is a law as well as a *conveyance*, and that such " effect will be given to it as will carry out the intent of " Congress. That intent should not be defeated by apply- " ing to the grant the rules of the common law, which are " properly applicable only to transfers between private par- " ties. * *

" When the location was made and the sections granted " ascertained, the title to the plaintiff took effect by relation " as of the date of the Act, except as to the reservations " mentioned; *the Act having the same operation upon the sec- " tions as if they had been specifically described in it.*"

So it was held in that case, that the title claimed by each of the railroad companies, plaintiff and defendant, was to be ascertained and governed *solely* by the *date* of the Act of Congress under which each claimed title, and not at all by the date of the filing of the map of definite location of the road of either company.

As already stated, the grant, being one *in præsenti*, it did not extend to or include any lands which were not granted at the moment the act became a law, as, in the words of this Court, it became a *conveyance* at the same time, and had " the same operation upon the sections (granted) as if they " had been specifically described in it" (the act.) The grant was never extended or enlarged, or provided to take effect

in whole or in part, at any time other than at its date. Or, in other words, *all* the lands that were ever granted or donated by the act were granted and became vested at *one* time, *i. e.*, when the act became a law.

Perhaps we cannot use more expressive or appropriate language in this behalf than that used by the Central Pacific R. R. Co., or its assignees, in a brief by them, filed in a cause pending in the Circuit Court from which the case at bar comes (*U. S. vs. Curtner*, No. 3,106), viz:

"All odd sections within the ten-mile limit, which were "not then, at the date of the Act, sold, reserved or other- "wise disposed of by the United States, and to which a pre- "emption or homestead claim should not have attached at "the time subsequent, when the line of the road should be "definitely fixed, are, by the terms of the Act, granted to "the company."

Or, in our own words: The Act of Congress was passed on July 1, 1862; and it not only granted, but conveyed, the title for all the land which the company ever took under or by virtue of the act, the same "as if they (the sections) had been "specifically described in it." And the sections which were thus granted, were odd-numbered, within a given distance of the line of the road, which were *then* in a condition to be granted and *conveyed* by the United States, *i. e.*, which were *then*, in the words of the Act, *public* land; and those odd-numbered sections which were then (at the date of the act) public land, were then subject to settlement and appropriation by homestead and pre-emption settlers up to the time the line of the road would be definitely fixed. The company was liable to lose some lands under the homestead and pre-emption laws only, but could gain no lands under any law between the date of the Act and the fixing of the line of its road.

Any land that was reserved or otherwise disposed of or sold, at the date of the Act, was not *public* land, and was not, therefore, granted to the Company.

This is the true and sound deduction and consequences of the very words and effect of the Act, as a grant *in præ-*

senti, and its exceptions; and it is well sustained by the decisions of this Court.

See

Leavenworth R. Co. vs. U. S., 92 *U. S. Rep.* 743.
Missouri Ry. Co. vs. Kansas Ry. Co., *supra.*
Railroad Co. vs. Baldwin, 103 *U. S. Rep.* 427.
Newhall vs. Sanger, 92 *U. S. Rep.* 761.
U. S. vs. Stone, 2 *Wall. R.* 525.
Dubuque and Pacific R. Co. vs. Litchfield, 23 *How. R.* (*U. S.*) 66.
Railroad Co. vs. Fremont Co., 9 *Wall. R.* 89.

"All grants of this description are strictly construed "against the grantee; nothing passes but what is conveyed "in clear and explicit language."

Leavenworth R. Co. vs. U. S, supra.

There have been many cases before this Court which discuss the subject, and decide the effect of the fixing of the line of the road of various railroad companies claiming lands under the Pacific Railroad Act, and other similar Acts; but none of these cases militates against, or even interferes with the doctrine or consequences of a grant *in præsenti* under the Act or Acts granting lands to or for the various subsidized railroad companies. As we have already stated, odd-numbered sections of land within the given distance from the line of the road, which was public land at the date of the Act, were subject to homestead and pre-emption settlement up to the time the company caused the line of its road to be fixed. In such instances, *as between the homestead or pre emption settler* and the company, it becomes all important to ascertain when the line of the road was definitely fixed.

See

Van Wyck vs. Knevals, 106 *U. S.* 366.
Walden vs. Knevals, 114 *U. S.* 373.
Newhall vs. Sanger, 92 *U. S. Rep.* 761.
Kansas Pac. R. R. Co. vs. Dunmeyer, 113 *U. S. Rep.* 642, and many cases of a similar character.

But, *as between the United States* and the railroad company, or between one company and another company, or between a railroad company and any other party claiming under a grant from the United States, excepting a pre-emption or homestead claimant, the all-important inquiry is, what was the condition of the land at the *date* of the granting Act under which the railroad company claims title? If it were *public* land at that date, it passed to the railroad company; and, if it were *reserved*, sold, or otherwise disposed of at that date, it was not granted to the railroad company, and a patent issued for it would be void.

Leavenworth R. Co. vs. U. S., supra.
Railroad Co. vs. Baldwin, supra.

The lands in controversy (assuming them to be within the boundaries of the Moquelamos Grant), were not released from the claims of that grant until February 13th, 1865. This was long after the passage of the Pacific Railroad Act. Being thus reserved, they were not *public* lands, and they were not granted to the railroad company, and the patents are void and should be canceled.

Newhall vs. Sanger, supra.
U. S. vs. Stone, 2 *Wall R.* 525.
Reichart vs. Felps, 6 *Wall R.* 160.
Best vs. Polk, 18 *Wall R.* 112.
Sherman vs. Buick, 93 *U. S.* 209.
Stoddard vs Chambers, 2 *How.* 285.
Patterson vs. Winn, 11 *Wheat.* 384.
Barry vs. Gamble 3 *How.* 53.
Mills vs. Stoddard, 8 *How.* 345.

B.

We most earnestly contend that this cause is governed by the condition of the lands in controversy, as to their being reserved, at the date of the Pacific Railroad Act (July 1, 1862); and, that it is immaterial *in this cause* as to whether the lands were or were not reserved at the time the line of

the road was definitely fixed. Yet, in view of the fact that the learned judge of the Circuit Court has, in his opinion, placed so much importance upon the date of the fixing of the line of the road, we feel constrained to present our views upon, and argue the matter, as to the time when the line of the road was definitely fixed, but without yielding our position as before stated; and herein,

C.

The line of the road of the Central Pacific Railroad Company of California, including that portion thereof which was assigned to the Western Pacific Railroad Company on October 31, 1864, *was definitely fixed, within the meaning of the Pacific Railroad Act, on the 8th day of December*, 1864, *and was definitely fixed on the ground on and prior to the 5th day of October*, 1864.

On the 8th day of December, 1864, the Central Pacific Railroad Company of California filed with the Secretary of the Interior a map designated as follows:

" Map of the line of the Western Division of the Central
" Pacific Railroad Company of California, from Sacramento
" to San Francisco."

On this map is inscribed the following certificate:

" UNITED STATES OF AMERICA,
" State of California,
" Office of the Central Pacific Railroad Company of Cali-
" fornia.

" We, the undersigned, the President, Secretary, and
" acting Chief Engineer, do hereby certify that this is a
" true and complete map of the line and route of the West-
" ern Division of said company's road and telegraph line
" from the city of Sacramento to the City of San Francisco,
" and the western terminus thereof, as *adopted, located, desig-*
" *nated, and fixed* by the Board of Directors of said com-
" pany, a copy of which is on file in the office of said com-
" pany in the city of Sacramento.

"Witness our hands and the corporate seal of said com-
" pany, hereto affixed, by order of said Board of Directors,
" this fifth (5th) day of October, 1864.

" [SEAL.] LELAND STANFORD,
" President,
" E. H. MILLER, JR.,
" Secretary,
" SAMUEL S. MONTAGUE,
" Acting Chief Engineer."

This map is marked "Exhibit A." The field notes of the survey of the Western Division, from which the map (Exhibit A) was compiled and constructed, show conclusively that *the line of the road was actually surveyed and staked out upon the ground*, as represented on said map. Attached to the field notes is the resolution of the Board of Directors, approving of the map and survey, marked "Exhibit G G G," and from page 3 thereof we quote. "And also to enable
" said the Central Pacific Railroad Company of California
" to make a proper, sufficient and valid assignment of said
" portions of said railroad and telegraph line to the Western
" Pacific Railroad Company, and, the *San Francisco and*
" *San Jose Railroad Company*, and for that purpose only,
" and to have no other force and effect than to establish
" the line, route and western terminus of the Pacific Rail-
" road, under the said Acts of Congress, * * * * *
" be it, and it is hereby ordered and resolved by the Board
" of Directors of said, the Central Pacific Railroad Com-
" pany of California, that the general route of the Western
" Division from Sacramento to San Francisco, of the rail-
" road and telegraph line of said Company is hereby ex-
" tended, *located* and *fixed and designated, as laid down and*
" *surveyed* from the city of Sacramento * * * to a
" point sixty-six feet west of the west line of Third street,
" on Brannan street, in the city of San Francisco, * * *
" which said *line* and *route* are more particularly *designated*
" and *described* as follows, to wit:"

(Here follows the field notes, at the conclusion of which,

on page 14, appears the following): "And which said *line or* "*route* also appears, by reference to a *map of the same,* "*duly certified* by the *President* and *Secretary* of this Com- "pany, under the corporate seal of this Company, *to be* "*filed in the office of the Secretary of the Interior* of the United "States, under and *in pursuance of the said Acts of Congress,* "which map is marked and designated as follows: Map of "the line of the Western Division of the Central Pacific "Railroad Company of California, from Sacramento to San "Francisco." All of which is certified to by E. H. Miller, Jr., as Secretary, under the corporate seal of the Company, and attested by the affidavit of E. B. Crocker, as witness to the signature.

It will thus be seen that the Western Division of said road was actually surveyed and staked out upon the ground by the engineers of said Company, and a map thereof duly made prior to the 4th day of October, 1864, and that upon said last-named day the map and survey were duly approved by the Board of Directors; and that upon the fifth day of October, 1864, a certificate of such approval was duly inscribed upon the face of said map and signed by the officers of the Company, and by them transmitted, together with the field notes of the survey, to Washington, and there filed with the Secretary of the Interior as the law directs. The map is certified as the *line and route* of the Western Division, *as adopted, located, designated and fixed by the Board of Directors.* What words more expressive of permanency or finality in the selection of said route could have been used, or that would more fully express the idea that the route was by such action "*definitely fixed,*" is hard to conceive. Certain it is, that judging from the language used by the Board of Directors in their approval of the survey and map, and the language used in the certificate inscribed upon said map, the officers of the Company regarded their action in the selection and approval of the route as a finality. As proof of this fact, it may be stated that the map of 1864, "Exhibit A," is the only map of said route ever filed with

the Secretary of the Interior by any person or party until more than a year after the completion of the road.

But the action of the officers of the Railroad Company subsequent to the filing of said map furnishes indisputable evidence that they regarded their action in the selection and adoption of the route delineated on "Exhibit A" as a finality. It was not until after these suits were commenced that any attempt was made to repudiate such action, or any claim made that the line of the road was not definitely fixed on December 6th, 1864, by the filing of that map.

The general Railroad Act of the State of California provides in express terms that: "Every railroad company in "this State shall, within a reasonable time after their road "shall be finally located, cause to be made a map * * * "and file the same in the office of the Secretary of State, "and also like maps of the parts thereof located in different "counties, and file the same in the office of the Clerk of the "County in which such parts of said road shall be, there to "remain as of record forever. The said map shall be cer- "tified by the chief engineer, the acting president and the "secretary of such company."

Stat. of Cal., 1861, pp. 624, § 43.

In compliance with the foregoing statute the Central Pacific Railroad Company of California, on the 10th day of January, 1865, filed a map of their road, *as finally located,* with the Secretary of State of the State of California, which map is an exact copy of "Exhibit A." This map is marked "Exhibit C."

On the 11th day of January, 1865, the Western Pacific Railroad Company filed a map of their road, *as finally located,* with the Secretary of State of the State of California. This map is an exact copy of "Exhibit A," and is marked "Exhibit B."

On the 12th of January, 1865, the Western Pacific Railroad Company filed in the office of the County Clerk of

San Joaquin County, California, a map of that portion of the route located in that county, which map is also an exact copy of so much of the route shown by "Exhibit A," as is located in San Joaquin County. This is marked "Exhibit D."

Maps of like character might have been obtained from the Clerk's office in every county through which the line runs, but it was considered unnecessary to do so, as enough has been obtained to show that the officers of company considered their action as final, and the line of the road as "*definitely fixed*" by the filing of said map.

That the Officers of the Land Department also regarded this action as a finality, and the line of the road as definitely fixed by the filing of the map "Exhibit A," is shown by their action subsequent thereto, in doing that which they had no legal right to do prior to the definite location of the line of the road. The map was filed in the Department of the Interior on December 8th, 1864, and on the 9th of that month was transmitted by the Secretary of the Interior to the Commissioner of the General Land Office, with directions to withdraw the granted lands along the line or route delineated on said map for the benefit of the railroad company. In obedience to this order, the Commissioner, on the 23d of that month, transmitted to Registers and Receivers of the U. S. Land Offices at Stockton, Sacramento, Marysville and San Francisco, diagrams of so much of said route as lay in their respective districts, with instructions to withdraw from pre-emption, private entry and sale the odd-numbered sections for a distance of twenty-five miles on each side of the line delineated on said diagram. This letter and diagram was received at the U. S. Land Office at Stockton, in which district most of the land in controversy is situated, at 11 A. M., January 31st, 1865. See Exhibits "U U," "V V," and "T T."

The Court in *Van Wyck vs. Knevals*, 106 *U. S.* 366, says:

"*The route must be considered as 'definitely fixed' when "it has ceased to be the subject of change at the volition of the "company.* Until the map is filed with the Secretary of the "Interior, the company is at liberty to adopt such a route as

" it may deem best, after an examination of the ground has " disclosed the feasibility and advantages of different lines. " But when a route is adopted by the company, and a map " designating it, is filed with the Secretary of the Interior, " and accepted by that officer, the route is established; *it is*, " in the language of the Act, *definitely fixed*, and cannot be the " subject of future change so as to affect the grant except upon " legislative consent. No further action is required of the " company to establish the route. *It then* becomes the duty " of the Secretary to withdraw the lands granted from mar- " ket." That portion of section 8 of the Act of 1862, (12 Stat 489,) which relates to this Company, reads as follows: " The Central Pacific Railroad Company of California, a " corporation existing under the laws of the State of Cali- " fornia, are hereby authorized to construct a railroad and " telegraph line from the Pacific Coast, at or near San Fran- " cisco, or the navigable waters of the Sacramento River, " to the eastern boundary of California, *upon the same terms* " *and conditions in all respects* as are contained in this Act " for the construction of said railroad and telegraph line " first mentioned." Section 7, which governs the case now under consideration, reads as follows:

" And be it further enacted, that said company shall file " their assent to this Act, under the seal of said company, " in the Department of the Interior, within one year after " the passage of this Act, and shall complete said railroad " and telegraph from the point of beginning as herein pro- " vided, to the western boundary of Nevada Territory, be- " fore the first day of July, one thousand eight hundred and " seventy-four.

" *Provided*, That within two years after the passage of this " Act *said company shall designate the general route of said* " *road, as near as may be, and shall file a map of the same in* " *the Department of the Interior*, whereupon the Secretary of " the Interior shall cause the lands within fifteen miles of " said designated route or routes to be withdrawn from pre- " emption, private entry and sale; and when any portion of " said route shall be finally located, the Secretary of the In-

" terior shall cause the said lands to be surveyed and set off " as fast as may be necessary for the purposes herein " named."

The Act of July 2nd, 1864 (13 Stat., 358) extended the time for filing this map one year, and increased the grant from ten to twenty sections on each side of the line of the road, and increased the limits of the withdrawal from fifteen to twenty-five miles on each side of the route of the road.

We have shown that this Company did designate the general route of their road and did file a map thereof in the Department of the Interior and that the Secretary of the Interior accepted this map (the map of 1864) as definitely locating the line and route of the road, and that upon its reception the Secretary immediately ordered the granted lands withdrawn from market.

On the 31st of October, 1864, the Central Pacific Railroad Company of California assigned to the Western Pacific Railroad Company the right and privilege to construct, own, maintain, and operate that portion of their railroad and telegraph line which extends from the City of San Jose to the City of Sacramento in the State of California, as laid down and delineated on "Exhibit A," with all the rights, privileges and emoluments conferred by Acts of Congress relative thereto. This assignment was ratified by Act of Congress, approved March 3d, 1865.

(See stipulation of agreed facts, pages and)

The Western Pacific Railroad Company proceeded immediately to construct their road under this assignment, and on the 27th of September, 1866, the President of said Company filed with the United States Surveyor-General for California the verified statement required by law to the effect that the first section of 20 miles of said road, viz: the first section of 20 miles northeasterly from the City of San Jose, was constructed, completed and equipped as required by law, and requested that the Commissioners be notified to examine and report upon said section of road. Whereupon the Surveyor-General notified the Commissioners, who proceeded to ex-

amine and report upon said section of road in accordance with the Acts of Congress relative thereto.

On the 5th day of October, 1866, the Commissioners made their report to the effect that said sections of road had been completed and equipped in all respects, as required by the Acts of Congress relative thereto.

Similar verified statements were made by the President of the Western Pacific Railroad Company, as follows: On April 28th, 1869, for a section of the road beginning at the junction thereof with the road of the Central Pacific Railroad Company of California, at the American River Bridge near Sacramento City, and extending thence southwesterly twenty miles; also on October 12th, 1869, for a section of said road beginning at the westerly end of the last mentioned section, and extending thence southwesterly sixty-three miles; also on December 29th, 1869, for a section of said road beginning at the westerly end of the last mentioned section, and extending thence twenty and two-tenths ($20\frac{2}{10}$) miles to the easterly end of the first-mentioned section of twenty miles, beginning at San Jose.

The foregoing statements were, immediately upon their being made, filed with the United States Surveyor-General for California, who thereupon, at the request of the Company, immediately notified the Commissioners. Immediately upon being notified, the Commissioners proceeded to examine and report upon said sections of road, which reports are dated as follows:

"First section, October 5th, 1866; second section, April 29th, 1869; third section, October 13th, 1869; fourth section, January 6th, 1870. Each of the four reports of said Commissioners was filed with the Secretary of the Interior, who recommended the acceptance of the same, and the issue of bonds, and patents for lands due on account of said sections of road, agreeably to the provisions of the Acts of Congress relating thereto. Thereupon, the President of the United States approved of said reports, and ordered the Secretary of the Interior and the Secretary of the Treasury to carry said recommendations into effect.

"The first approval by the President of the United States is dated December 4th, 1866, and the last is dated January 21st, 1870.

"The four sections above mentioned comprise the whole of said road from the city of San Jose to the city of Sacramento. Said road has been in full operation, and operated for the transportation of passengers and freight, since the 9th day of June, 1869." The foregoing has been abridged from the stipulation of agreed facts.

The officers of the Company also selected lands, and the selections were approved by the proper officers of the Land Department, thus showing that the map filed December 8th, 1864, was regarded as the map fixing the definite location of the route of the road.

October 8th, 1866, the W. P. R. R. Co. presented its first selections of land for approval and patent. In the affidavit of the agent selecting these lands appears the following words, *verbatim* in every selection:

"That the said lands are vacant, unappropriated, and not "interdicted mineral or reserved lands, and are of that "character contemplated by the Act, being within the "limits of twenty (20) miles on each side of the line of route "of said road."

In every selection the following appears in the certificate of the Register and Receiver in whose district the lands selected are situated:

"And we further certify that the filing of said list is "allowed and approved, and that the whole of said lands "are surveyed public lands of the United States, and within "the limits of twenty miles on each side of said road." "Exhibit F."

December 11th, 1866. The W. P. R. R. Co. presented another list of lands for approval and patent. "Exhibit H."

January 11th, 1867. The W. P. R. R. Co. presented another list of lands for approval and patent. "Exhibit I."

June 9th, 1867. Patent No. 1 was issued to the W. P. R.

R. Co., for lands lying along the first section of road from San Jose northeast through Alameda Cañon. "Exhibit S."

August 15th, 1867. The W. P. R. R. Co. presented another list of land for approval and patent. "Exhibit K."

February 8th, 1868. The W. P. R. R. Co., presented another list of land for approval and patent. "Exhibit L."

September 11th, 1869, the W. P. R. R. Co. presented another list of lands for approval and patent. "Exhibit N."

September 17th, 1869, the W. P. R. R. Co. presented another list of lands for approval and patent. "Exhibit O."

November 12th, 1869, the W. P. R. R. Co. presented *two lists* of lands for approval and patent. "Exhibit Q."

January 18th, 1870, the W. P. R. R. Co. presented another list of lands for approval and patent. "Exhibit R."

The foregoing lists of selections embrace all the lands to which the Company has obtained patents between San Jose and Sacramento, except a small portion that was not surveyed at the time these selections were made.

In the resolution of the Board of Directors approving of the survey and map of the Western Division, "Exhibit G G G," appears the following language:

"And also to enable said, the Central Pacific Railroad "Company of California, to make a proper, sufficient and "valid assignment of said portions of said railroad and tele- "graph line to the Western Pacific Railroad Company, and "the San Francisco and San Jose Railroad Company," etc., showing that an assignment of certain portions of the route to each of said companies was contemplated. In due course of time the route from San Francisco to San Jose was assigned to the San Francisco and San Jose Railroad Company and from San Jose to Sacramento to the Western Pacific Railroad Company.

January 3rd, 1866, the President of the San Francisco and San Jose Railroad Company filed with the United States Surveyor-General for California the verified statement required by law, alleging that the portion of the road between San Francisco and San Jose—some fifty miles or more—was completed and equipped as contemplated in the Acts

of Congress, and, claiming lands and bonds as an assignee of the Central Pacific Railroad Company of California, requested that the Commissioners be notified to examine and report upon said road. "Exhibit T."

As the San Francisco and San Jose Railroad Company claimed, either in whole or in part, the same lands as were claimed by the Western Pacific Railroad Company, a conflict naturally arose as to which company was entitled to the lands. This conflict prevented the issuing of patents to the Western Pacific Railroad Company for more than two years.

May 15th, 1867, Mr. Henry Beard, as attorney for the W. P. R. R. Co., addressed the Commissioner of the General Land Office, requesting that patents issue to the W. P. R. R. Co. for $22,562\frac{20}{100}$ acres of land, included in "Exhibit V."

October 30th, 1867, Mr. Henry Beard, on behalf of the W. P. R. R. Co,, filed a written argument with the Commissioner protesting against the suspension of the issuing of patents to that Company, claiming that the San Francisco and San Jose Company ought not to be recognized as a rival claimant stating as follows:

"The Executive power does not, I hope, propose to undo "what Congress has done—to vacate the grant that Con- "gress has made, and turn over the granted lands to another "party, * * * So far as the San Francisco and San "Jose Company's claim to these lands is concerned, the talis- "manic words, 'Too late! too late!' are the death knell to "its ambitious aspirations. * * * I therefore "respectfully insist that no further delay shall issue in issu- "ing patents upon the selections above mentioned. 'Ex- "hibit V.'"

November 2d, 1867. Mr. Henry Beard again addressed the Commissioner and demanded that patents issue to the W. P. R. R. Co., for the lands selected. "Exhibit V."

March 22d, 1869. The matter having been brought before the Secretary of the Interior, orders were issued that no patents issue until further orders from his office. Included in "Exhibit V."

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January 28th, 1870. Mr. Charles McLaughlin, Land

Agent of the W. P. R. R. Co., addressed the Commissioner, requesting that patents issue for lands selected in Stockton Land District. Included in "Exhibit V."

October 12th, 1869. Leland Stanford as President, and E. H. Miller, Jr., as Secretary of the W. P. R. R. Co., made affidavits that not less than 103 miles of that road was completed and in operation, and requested that bonds be issued to the Company. "Exhibit O O O."

October 23d, 1869. Mr. Jas. H. Storrs, as Agent and Attorney for the W. P. R. R. Co., addressed the Hon. Secretary of the Interior, reporting the completion of 63 miles in addition to the 20 miles theretofore reported, and requesting that $1,800,000 in bonds be issued to the Company. "Exhibit O O O."

It will thus be seen that from the time "Exhibit A" was filed in the Department of the Interior both the Government and the Railroad Company regarded the line of the road as "*definitely fixed.*" The company proceeded to construct the road; the Secretary withdrew the lands from the market. The Company selected lands, the selections were approved, and the lands patented to the Company; *all under the map* of 1864. When we examine the Acts of Congress applicable in this behalf, we find provision made for the filing of *one* map, and only *one map*, in the Department of the Interior, which is provided for in Section 7 of the Act of 1862, (12 Stat. 489) which is in said Act entitled a map of the "*general route,*" and the filing of this map definitely fixes the line of the road within the meaning of said Acts of Congress. When this map is filed it is the duty of the Secretary of the Interior to withdraw the lands granted from market. We find that this was done in the present case. The map was filed and accepted by the Secretary of the Interior, and thereupon, and with reference thereto, the lands were withdrawn from market; and, finally, the road was constructed on the route delineated on this map. The lands were selected by the Company, and the selections were approved by the proper officers. The road was examined and reported upon by the Commissioners. The reports of the Commissioners were approved

by the Secretary of the Interior, and *the entire road was accepted by the President of the United States, prior to February 1st*, 1870. It will also be seen that all of the selections of land were approved, and a portion patented to the company, prior to February 1st, 1870, and that the issuing of patents was suspended solely for the reason that the Western Pacific and the San Francisco and San Jose Companies both claimed the same land, and the Land Department very properly refused to issue patents to either claimant until the controversy was determined. The road was fully completed, equipped, and operated for the transportation of passengers and freight prior to June 9th, 1869. (See stipulation of agreed facts.) The Company was entitled to have patents issued long prior to February 1st, 1870, and this right the Company recognized, and, as before seen, endeavored for years prior to that date to obtain the patents; and but for the adverse claim made by the San Francisco and San Jose Company—which was the only reason ever urged for its refusal—the Land Department would undoubtedly have complied with the repeated requests and petitions of the W. P. R. Co., and issued all the patents prior to that date.

Defendants have presented a map "Exhibit 17," which was filed in the office of the Secretary of the Interior, February 1st, 1870, and claim that the filing of this map was the act which "definitely fixed" the line of the road, and the line of the road was not definitely fixed until the first day of February, 1870, when this map was filed. The statute provides that "within two years after the passage of this "Act, said Company *shall* designate the general route of "said road, as near as may be, and shall file a map of the "same in the Department of the Interior, whereupon "the Secretary of the Interior *shall* cause the lands "within fifteen (twenty-five by Act of 1864) miles of "said *designated* route or routes to be withdrawn from pre-"emption, private entry and sale." The act is mandatory in its nature, the word "shall" is used both with regard to the filing of the map and the withdrawal of the land. The company was compelled to either file that map within the

statutory time, or in the absence of remedial legislation, forfeit their rights. By the Act of 1864, the time for filing this map, was extended one year, and no more; hence, if no other objection could be raised, the fact that this map was filed several years after the legal time for so doing had expired would be an objection fatal to its reception by the Court. Now, for what purpose was this map filed? Why did Congress oblige each company to file a map, designating the general route of the road, with the Secretary of the Interior, before proceeding to construct the same? Upon the filing of this general route map, it became the duty of the Secretary to withdraw the lands granted from market. The Secretary is authorized to withdraw no other than the granted lands, and he is to withdraw those lands upon the filing of this map. Evidently then, it is the intent and meaning of the statute that the map filed by the company, (the *General Route Map,*) must be such a map as will enable the Secretary of the Interior, upon an inspection thereof, to identify the lands granted with certainty. This map is of no other use, serves no other purpose, than to enable the Secretary to identify the lands granted for the purpose of withdrawal and subsequent patenting thereof to the railroad company.

The law requires impossibilities of no man, and as upon the filing of this general route map the Secretary is required to withdraw the granted lands, he would have a legal right to refuse to accept or file a map the inspection whereof would not enable him to identify the lands granted; as such map would not be the kind or character of map contemplated in the statute. Immediately upon the filing of the map of 1864 the granted lands were withdrawn from market. No such action followed the filing of the map of 1870, for the granted lands were withdrawn six years prior to that date. And, not only had the lands been withdrawn six years when that map was filed, but a portion of the lands had been patented, the entire road had been constructed and completed, examined by the Commissioners and accepted by the President. In fact the entire road had been operated

for the transportation of passengers and freight for more than a year before that map was in existence. Moreover, the map of 1870 asserts on its face that it is a map of the road as *constructed*. The idea of attempting to substitute a map of the road as constructed (prepared more than a year after the completion of the road) for a map of the general route is not only novel, but absurd. The Act of Congress is clear and explicit. It is also mandatory.

The company was obliged to file a map of its general route or forfeit its rights under the statute. No provision is made for the filing of any other map or maps, and the filing of the map of 1870 with the Secretary of the Interior was wholly unauthorized by law. This Court has decided that: "the route must be considered as '*definitely fixed*' when it "has ceased to be the subject of change at the volition of "the company." The question then arises, did the filing of the map of 1864 place it beyond the power of the company to change the route of the road so as to affect the grant without legislative consent? If not, the company was at liberty to thereafter file another map, adopting a different route, and secure a second withdrawal of lands for their benefit, without the consent of Congress. And, if a second, why not a third, a fourth and a fifth—and, in short, why not continue to adopt routes, file maps and secure the withdrawal of lands until the entire public domain is exhausted?

There is as much law for the filing of a hundred maps and the securing of a hundred withdrawals of land as there is for the filing of two.

The Act, as before stated, is explicit in its directions and commands: there is nothing left to construction and consequent interpretation. The law provides for the filing of one map, and only one map, consequently this map must be a map of the entire line of the road. Upon the filing of this map there must be one withdrawal, and only one withdrawal, consequently it must be a withdrawal of all the lands granted. The Act said: "The Secretary shall cause the lands within "fifteen (twenty-five) miles of said designated route or routes "to be withdrawn from pre-emption, private entry and sale."

One map and one withdrawal is all that is provided for in the Statute.

It was decided by the Court below that: "There is nothing in the Act that in express terms, or by necessary implication, requires the filing of a map of the route as 'finally located,' nor that prescribes the time wherein the 'route shall be finally located.'" Yet, as will be seen by the quotation given below, the decision proceeds upon the exact opposite theory, *i. e.*, as though it was absolutely necessary to file—a map unknown to the Statute—a map of definite location: "Now, in this case, the map of December 8th, 1864, as we know, has not been regarded by either the Company, or treated by the Department, as anything but the map of the "General route of said road," and no map of the definite location was filed, or accepted, as the definite location till February 1st, 1870." * * *

"It, therefore, appears to us, whatever views other may take, that the equities of the case, under the conditions set out, and the facts, as they appear in the case, as well as the legal rights of the parties, imperatively require that the map of February 1st, 1870, and not the map of December 8th, 1864, should be held and finally established to be the map of definite location; and, if the map of February 1st, 1870, be not the map of definite location, then, that the route was not definitely fixed, until it was, in fact, actually located in 1867–68, on the line where it was afterward, in fact, actually constructed; or else, till the route and the completion of the road were approved by the President; and either of these periods were subsequent to February 13th, 1865, and sufficient to render these patents valid at law."

The railroad companies which have received grants of land from the general government, have for years labored most industriously to foster and encourage a species of *judicial legislation*—an interpolation instead of an interpretation of the statute. A placing of words in the statute by interpolation, falsely called construction, which Congress itself has not seen fit to place there. But we are satisfied

that so pernicious a practice will be promptly condemned by this Court.

A general route map is the only map, the construction and filing of which is authorized by the statute.

The reason why the statute denominates this a general route map is obvious, as will be seen upon an examination of the subject, although, in the decision of the Court below, great stress is laid upon the fact that the map of 1864 is denominated a general route map, or a map of the general route.

Independent of the fact that a general route map is the only map recognized by the statute, there are obvious reasons for its being called a general route map. In *Van Wyck vs. Knevals, supra,* the Court says: "But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the Act, "*definitely fixed,*" and cannot be the subject of future change, *so as to effect the grant,* except upon legislative consent. * * * * * * * * * * *

"As to the alleged deviation of the road constructed from "the route laid down on the map, admitting such to be the "fact, the defendant is in no position to complain of it, the "lands in controversy are within the required limit, "whether that be measured from one line or the other. A "deviation of the route without the consent of Congress, so "as to take the road beyond the lands granted, might, per-"haps, raise the question whether the grant was not aban-"doned; but no such question is here presented. The "deviation within the limits of the granted lands in no way "infringed upon any rights of defendant."

The Court *does not say that* after *the route* has been "*definitely fixed*" it *cannot be changed* at the volition of the company, *but that it* "*cannot be the subject of future change so as to affect the grant;*" the change of route *must not* be such as will "*take the road beyond the lands granted,*" as that would "raise the question whether the grant was not abandoned."

That is, after the general route map has been filed with

the Secretary of the Interior and the line of the road has thereby become "*definitely fixed*," the company *may change the line* of their road or route *at pleasure, so long* as such change *does not* "*take the road beyond the lands granted*," which would be twenty miles from the line laid down on the general route map. For, says the Court: "a deviation "within the limits of the granted lands in no way infringed "upon any rights of the defendant."

In support of the foregoing we would respectfully cite the Court to

Railroad Co. vs. Baldwin, 103 *U. S.* 427.
Knevals vs. Hyde, 5 *Dillon* 469, *S. C.*
Grinnell vs. Railroad Company, 103 *U. S.* 742.
Van Wyck vs. Knevals, 106 *U. S.* 366.
Walden vs. Knevals, 114 *U. S.* 374.
Leavenworth, etc., R. Co. vs. U. S., 92 *U. S.* 733.
U. S. vs. Burlington and Missouri R. R. Co. 4 *Dillon*, 305.
Missouri Ry. Co. vs. Kansas Pacific Ry. Co., 97 *U. S.* 491.

In the case of the *Morris and Essex R. R. Co. vs. Blair*, 9 *N. J. Ch.* 653, the priority of right to certain passes through the mountains in New Jersey was the subject of controversy. The Warren Company had made a prior survey to that of Morris Company. But the Morris Company was the first to comply with the law in the matter of filing a plat of their survey with the Secretary of State. The charter of each company provided that "when the route of such road shall "have been determined upon, and a survey of such route "deposited in the office of the Secretary of State, then it "shall be lawful for said company to enter upon" and construct their road. The Court, in its judgment, says: "It "may be true that the complainant first actually surveyed "in the passes where the conflict occurred, although there "seems to be some doubt upon this subject. But, assuming "it to be true, the experimental surveying of a route will

" not confer any vested or legal right until it shall have been " adopted; until then, the company is in nowise committed " to it. If done by their direction they may change their " mind and go elsewhere. It may be the mere act of their " engineer, and he may recommend it or not. If he should " the company may reject it and select another route. Al- " though the complainants, therefore, may have first sur- " veyed the conflicting passes in the mountains, yet the " Warren Company afterwards surveyed the same passes " and *first adopted the route*, and first filed their survey in the " office of the Secretary of State. *This gave them a legal* " *right to the route surveyed*, and, in my view, excluded the " complainants from occupying the same lands." Will anyone contend that after the filing of the map of 1864, another company would have been allowed to adopt the same route? *Did not the filing of this map give the company a legal and exclusive right to the route thus adopted?* We think it did. And furthermore, we are satisfied that any Court would have sustained their right to the route thus adopted, to the exclusion of all intruders, had any attempt been made to usurp the route thus legally adopted by them. In the case of *Newhall vs. Sanger, supra.*, the Court decided that the line of the road was definitely fixed between the first day of the October Term, 1864, and the 31st day of January, 1865. We think enough has been said to convince the Court that that decision is correct, as the line of the road was definitely fixed by filing a map thereof with the Secretary of the Interior, December 8th, 1864, which is between those dates.

To counteract this recorded array of maps, patents, transactions and proceedings, the defendants have introduced a map (under objections which we claim are well taken) which was filed in the General Land Office on or about February 1, 1870, and which was apparently gotten up in the engineer's department of the West. P. R. R. Co., and purports to be a map of the *constructed* line of the road from San Jose to Sacramento. It was never adopted by the Board of Directors, and was not signed by the president, secretary, or any officer

of the Company except the engineer. It was not filed until the road had been in full operation for over seven months, and until some of the patents for lands had been issued nearly three years. It is certain this diagram (without field notes or survey) of the constructed road, then long in full operation, was never intended by the Company to be the original map of the definite location of the line of the road, within the intent and meaning of the Pacific Railroad Act. In our uninformed condition, we cannot surmise what the object was for preparing this map of the completed and operated road, unless it be to constitute a muniment of title, and supply particular information for the contemplated consolidation and merger of the West. P. R R. Co. with the Cent. P. R. R. Co. of Cal., into the present Cent. P. R. R. Co., which took place on June 22, 1870. (See agreed facts.)

The road was in full operation seven or eight months before this map appeared; and it is but a map or diagram of the road as *constructed* and in operation. There is no provision of law or authority for the filing of such a map in the General Land Office; nor is there any provision or authority for the preparation or use of such a map for any purpose. So we shall say no more about this map until we hear from our learned friends on the other side; hoping that they will distinctly state what they claim on its account, if anything.

We submit that it appears conclusively that the line of the road of the Cent. P. R. R. Co. of Cal., including the Western Division thereof, was definitely fixed on the 8th day of December, A. D. 1864.

And we submit, further, that the Circuit Court misconstrued the Pacific Railroad Act, and overlooked the adjudications of this Court when it decided in this cause that the grant of lands to the Railroad Company took effect on February 1, 1870, when the map or diagram of the *constructed* road was placed in the General Land office, or in 1867–68, when, it is assumed the line of the road was actually located on the ground.

As we take it, the remainder of the exhibits and testimony

presented by defendants, not specially mentioned here, whether the same is to be rejected or not under the objections made to them, do not aggregately or separately even tend to detract from the main facts which we claim have been established here. The main facts are, that:

1st. In due time there was a claim presented by one Andres Pico, to the Board of Land Commissioners, to the effect that the Mexican authorities had granted to him eleven square leagues of land on the river Moquelamos and adjoining the Gulnac grant on the south; and that this claim of Pico was subsequently confirmed by the U. S. District Court for the Northern District of California, and was by the Decree of that Court described as follows. "Eleven square "leagues on the river Moquelamos, bordering on the north "upon the southern shore of said river; on the east upon "the adjacent ridge of mountains; on the south upon the "lands of Mr. Gulnac; and on the west upon the estuaries "of the shore;" and that this claim continued to be *sub judice* until the 13th day of February, 1865.

2d. All the lands involved in those suits lie within those boundaries, as thus designated.

3d. The Pacific Railroad Act constituted a grant *in præsenti*, and it was passed and went into effect long before February 13, 1865, when the lands in controversy ceased to be reserved under the claim of Los Moquelamos.

4th. The line of the road of the Cent. P. R. R. Co. of Cal., including the western division thereof, assigned to the West. P. R. R. Co., was definitely fixed on the 8th day of December, 1864, and the lands to which it was entitled under the Pacific Railroad Act were ordered withdrawn for its benefit on the 23d day of December, 1864; and the order of withdrawal was put into effect in the Stockton U. S. Land District on January 31, 1865.

5th. All the land located within the boundaries of the Moquelamos grant, including the lands involved in these suits, was held and claimed as a part of that Mexican grant until the 13th day of February, 1865, and were, therefore, *reserved* from the grant made to the Railroad Company.

From these facts it follows that the patents issued for those lands to the Railroad Company were issued without authority of law, and are and have always been *void.*

Newhall vs. Sanger, supra.

L. L. & G. R. R. Co. vs. U. S., 92 *U. S. Rep.*, 733 *supra.*

Carr vs. Quigley, 57 *Cal.*, 394.

McLaughlin vs. Powell, 50 *Cal.*, 67; and many other cases which we deem unnecessary to cite.

These patents being *void ab initio*, there is no foundation or material for any defense to these suits; because, the defendants acquired *nothing* under these patents, and there is, therefore, nothing to defend. Nevertheless, by reason of their *existence and form*, those patents have been permitted to prevail in actions at law, under the rule of the Circuit Court, from which this case comes, as if they were valid and had really conveyed the title; and, consequently, it has become necessary to resort to these suits in equity to have those patents declared to be what in fact they are, *null and void*, and to have them *cancelled*, so that they may effect no more mischief, under an assumed vitality which they never possessed, and under the false pretense of a fair form which has been used to save them from attack and from the exposure of their nullity.

Van Wyck vs. Knevals, supra.

We therefore respectfully move the Court for decrees in accordance with the prayers of the bills, *i. e.*, that these patents be "cancelled and declared null and void."

A. H. GARLAND,
Attorney-General.

MICH. MULLANY and
D. M. DELMAS,
Of Counsel for Complainant.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1027.

UNITED STATES,

Appellants,

vs.

Kate D. McLaughlin, et al.

BRIEF FOR APPELLEES.

A. L. RHODES,
Solicitors for Appellees

Supreme Court of the United States.

THE UNITED STATES,
Appellants,

vs.

KATE D. McLAUGHLIN, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

Statement of Facts.

This is one of seven actions that were instituted at the same time, in the year 1885, and tried and decided together by the Circuit Court.

The actions were brought by the Attorney-General, without any special statutory authority, but under the authority which, it is claimed, he possesses by virtue of his office. They were brought to procure decrees cancelling seven patents, issued to the railroad company in pursuance of the Acts of Congress of July 1, 1862, and of July 2, 1864, commonly known as "Pacific Railroad Acts."

The larger portion of the facts in these cases are stated in a stipulation made by the parties to the actions. (Record, page——).

After the passage of those Acts, the Central Pacific Railroad Company of California assigned to the Western Pacific Railroad Company the right to construct the portion of the road between Sacramento and San Jose, and the assignment was ratified by an Act of Congress. The lands in controversy are opposite to the line of the Western Pacific Railroad. Those companies were consolidated in June, 1870, shortly after the filing of the map of definite location of

the road in 1870, under the name of the Central Pacific Railroad Company; and that company succeeded to all the rights and property of the two prior companies.

The lands described in the several patents are situated in the same section of country, and on the eastern side of the railroad, between the cities of Sacramento and Stockton.

The first of the patents was issued in 1870, soon after the map of the definite location of the line of the railroad was filed in the General Land Office; and the others were subsequently issued,—the one involved in this case having been issued in 1875.

The defendants deraign title under the patents to the railroad company, and many of them through long chains of title. Many of the tracts are incumbered by mortgages, and others are affected by contracts of sale; and each and all of the defendants were purchasers for valuable considerations. The railroad company transferred its title to the lands to individual purchasers, many years prior to the commencement of these actions, and indeed, prior to the decision in *Newhall* vs. *Sanger*, by this Court—92 U. S. 761.

All these persons are *bona fide* purchasers, if it be possible that persons can be such, who know or have notice of only those facts which the United States knew when issuing the patents, and of which the General Land Office possessed written evidence.

The railroad company does not own an acre of these lands. It has only the naked legal title to three tracts, comprising about 400 acres, which have been sold and paid for, the deeds not being delivered because of a controversy between the first purchaser from the railroad company and his vendee.

The gravamen of the action is contained in the allegations of the bill to the effect that when the railroad company filed its map of the definite location of the line of its road,—which they aver was in 1864—the lands in question were *sub judice*, and were reserved by operation of law to satisfy a claim to the Moquelamos Grant, which, in February, 1865, was rejected as fraudulent and void.

The complainants produced in evidence a map of the route or line of the Western Pacific railroad, filed with the Secretary of the Interior on December 8th, 1864; and they claim that it is the map of the definite location of the line of the road. Complainant's Exhibit A.

The defendants produced a map of the line of the railroad, filed with the Secretary of the Interior February 1st, 1870, and claim that

this is the map of the definite location of the line of the railroad. Respondents' Exhibit No. 17. For convenience, these maps may be denominated as the "Map of 1864," and the "Map of 1870."

It appears from the stipulation above referred to (Record, p. ——) that all the provisions of the Pacific Railroad Acts, from the acceptance of the conditions of those Acts of Congress up to and including the issue of the patents, were fully and, we may add, literally complied with, both by the United States and the railroad companies, so far as the sections of the railroad, opposite to the lands in controversy, are concerned. The records of the General Land Office show the performance of every act required on the part of the United States or the railroad companies. Those records furnish proof of every fact in the case except one—which is the position of the disputed line of the pretended Moquelamos Grant.

There is a body of land containing more than twenty square leagues, or about sixty leagues, as claimed by the complainants, lying on both sides of the railroad, and between the Moquelumne and Calaveras Rivers, which is called the Moquelamos Grant, or rancho.

It appears, by the stipulation above mentioned, that in 1852 Andreas Pico presented to the Board of Land Commissioners under the Act of Congress of March 3d, 1851—to ascertain and settle private land claims in California—his petition for the confirmation of his claim to a tract of land called "Moquelamos," he claiming eleven square leagues of land. The Land Commission rejected the claim; the District Court on appeal confirmed the claim; the Supreme Court reversed the decree of the District Court and remanded the cause; the petition was again heard by the District Court, and the claim rejected on June 4th, 1862; and the Supreme Court finally rejected the claim as fraudulent, on February 13th, 1865. See

Pico vs. *United States*, 2 Wall., 279.

The parties to these actions disagree as to the eastern boundary of that fraudulent claim or grant; and the greater part of the oral testimony in the record has relation to that issue.

No objection was made to the title enuring to the railroad company until many years—about ten years—after the filing of the map of the definite location of the route of the road, in 1870. The objection was presented by a large number of persons, who assumed the

authority to redress the wrongs that had been sustained by the United States, and to interfere with the execution of the contract made between the United States and the railroad company, and who, in affording redress in their own mode, proceeded, after the lapse of ten or more years after the filing of the map of definite location, to take possession of the lands which they claimed ought not to have been conveyed to the railroad company. The first action that was brought by the United States against the railroad company, at their instigation, was decided by the Circuit Court in 1882, against them,—nominally the United States. (See 8 Sawyer, 81.) The Court decided the case *both on its merits*, and on the ground that prior to the commencement of the action, the railroad company, which was the only defendant, had conveyed all its interest in the lands in question to third persons, and who were not made defendants.

In these cases now before the Court the bills of complaint state only one ground of attack upon the patents. The ground is that the map of the definite location of the line of the railroad was filed with the Secretary of the Interior, as the bills allege, on the eighth day of December, 1864 (Record, p. 4); and that when the line of the railroad was definitely fixed by the filing of the map as aforesaid, the lands described in the patents were held and reserved for the adjustment and satisfaction of the Moquelamos Grant claim—that the lands were then *sub judice*. (Record, p. 5.) It is alleged in the bills that for that reason the patents were issued without authority of law. It will be remembered that the defendants claim that the map of definite location was filed February 1st, 1870.

The bills do not allege fraud, accident, or mistake on the part of both or either of the parties; nor do they allege any fact tending to show fraud, accident, or mistake in issuing the patents.

The decision of the Circuit Court in the cases now before this Court shows that the Circuit Court found every *material fact* in issue, or even in controversy, in favor of the defendants.

There are two principal questions of fact in issue in these cases:

1st. When was the map of the definite location of the line of the railroad filed with the Secretary of the Interior? Or, stated in another form, which of the two maps—the map of 1864 and the map of 1870—is the map of the definite location of the line or route of the railroad?

2d. Where is the eastern boundary of the pretended Moquelamos Grant?

It will be convenient to state in chronological order the most important facts in this case:

1852—September 22. Andreas Pico presented petition to Board for confirmation of Moquelamos Grant.

1854—October 3. Pico's claim rejected by Board of Land Commissioners.

1855—June 11. Appeal by Pico to District Court.

1857—April 24. Claim confirmed by District Court.

1857— United States appealed to Supreme Court from decree of District Court.

1859—December Term. Judgment of District Court reversed and cause remanded by Supreme Court.

1861—June 1. Central Pacific Railroad Company of California organized.

1862—June 4. District Court rejected Pico's claim to Moquelamos Grant.

1862—July 1. Pacific Railroad Act passed

1862—October 15. Second appeal to Supreme Court by Pico.

1862—December 13. Western Pacific Railroad Company organized.

1864—July 2. Second Pacific Railroad Act passed.

1864—October 31. Assignment of C. P. of California to W. P. R. R. Co.

1864—December 8. General route map filed with Secretary of the Interior by Western Pacific Railroad Company.

1864—December 23. Lands ordered withdrawn for Western Pacific Railroad Company within twenty-five mile limits.

1865—January 31. Lands withdrawn by orders filed in the local Land Offices.

1865—February 13. Supreme Court rejected Moquelamos claim.

1866—October 5. Commissioners appointed under section 6 of the Act of 1864, reported the completion of the first section of twenty miles of Western Pacific Railroad from San Jose towards Stockton.

1869—April 29. Similar report filed.

1869—October 13. Similar report filed.

1870—January 6. Similar report filed.

[The last three reports covering the line from Sacramento, through Stockton, to the easterly end of the first section.]

1870—February 1. Definite location map of Western Pacific Railroad filed.

1870—April 9. First patent issued for lands in these actions.

1870—June 21. Consolidation of Central Pacific Railroad Company of California and Western Pacific Railroad Company, under name of Central Pacific Railroad Company.

1871—November 25. Second patent issued.

1872—April 3. Third patent issued.

1874—February 28. Fourth patent issued.

1875—November 23. Fifth patent issued.

1879—June 6. Sixth patent issued.

1880—January 27. Action to annul five of the seven patents commenced in the Circuit Court.

1881—July 21. Seventh patent issued.

1882—April. Bill dismissed by Circuit Court in action to annul the five patents. (8 Saw., 82.)

There are certain propositions of law which require attention before considering the above questions of fact, as they are not materially dependent upon the answers to be given to those two questions.

I.

It Does Not Appear that the United States are Interested in this Litigation.

There is no averment in the bill that the United States own any of these lands, or that they would enure to them if the patents be annulled by the decree of this Court. Presumption will not be permitted to supply the place of an averment of the fact. If not the owners of the lands, the United States have no right to attack their conveyance.

This Court has on several occasions intimated a doubt as to the authority of the United States to maintain such an action as this, when not interested in the results of the litigation. See

United States vs. *Minor*, 114 U. S., 243.

II.

This is a Stale Claim.

The first of the patents was issued in 1870, and the others from time to time up to 1881. It is not alleged in the bill that any fact

has been discovered since the date of the first, or of any other of the patents, relating to or connected with their issue, or to the action of the officers of the government of the United States, or either of the railroad companies; nor is it alleged that any fact upon which the right of the railroad company to the lands rests, was concealed from the Land Department. It is impossible for such an allegation to be made; for every fact upon which the right of the railroad company to have the patents issue, is found in the records of that Department, except the decision of this Court, rejecting the fraudulent claim to the Moquelamos Grant—and of that the United States had notice, for they were parties to the action in which that decision was rendered. The United States will therefore be held to have known, at the date of the first patent, in 1870, every fact relating to these patents, or upon which they issue. When the United States enter a Court of equity, they stand on the same ground as a private individual, and must present a case entitling them to equitable relief.

United States vs. *White*, 9 Saw., 131;
The Siren, 7 Wall., 154.
United States vs. *Flint*, 4 Saw., 58.

A private party could not successfully invoke the aid of a Court of equity, after such delay as is exhibited here, with a knowledge of all the facts upon which he bases his claim to relief. The Court would regard his laches as inexcusable, and condemn his claim as a stale claim.

United States vs. *White*, 9 Saw., 131, and cases cited.

This ground, though often mentioned as a ground of defense to a bill in equity, is not a defense that requires to be stated. It is only a defense in the sense that the want of equity in the bill is a defense. The bill must state a case which is free from the objection that the cause of action is a stale claim. The objection is not required to be specified in the demurrer, or set forth in the plea or answer.

Badger vs. *Badger*, 2 Wall., 92;
Stearns vs. *Page*, 7 How., 829.
Sullivan vs. *Portland*, 94 U. S., 811;
Twin Lick Co. vs. *Marbury*, 91 U. S., 587;

U. S. vs. *Tichenor*, 8 Saw., 156;
U. S. vs. *Flint*, 4 Saw., 58;
Manning vs. *San Jacinto*, 7 Saw., 430;
1 Pomeroy Equity, Secs. 418–19.

In *Twin Lick Oil Co.* vs. *Marbury*, *supra*, the Court say:

"The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be determined by any number of days or years, as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it, which affect that question. These are generally the presence or absence of the parties at the time of the transaction, their knowledge or ignorance of the sale, and with the facts which render it voidable, the permanent or fluctuating character of the subject matter of the transaction, as affecting its value and the actual rise or fall of property in value during the period within which this option might have been exercised."

The Court likened this class of cases to cases of fraud, in which it is held that the party is bound to act with reasonable diligence as soon as the fraud is discovered. Here, we repeat the railroad company was required by the Acts making the grant, to sell the land within three years; otherwise it should be subject to pre-emption at $1.25 per acre. In other words, the patents were issued in contemplation of the requirement of speedy sales of the land. A delay of several years in instituting actions to cancel the patents, is entirely without justification or excuse.

III.

The Purchasers of these Lands from the Railroad Company, Being Bona Fide Purchasers, are entitled to Protection.

The stipulation (Record, p. 73), shows that the defendants, other than the railroad company, purchased the lands from the railroad company for valuable considerations. There is no pretense that they had notice, either actual or constructive, of any fact, of which the United States had no knowledge, at the times of the issues of the several patents, or of any fact affecting the validity of the patents. The third section of the Act of 1862 makes it manifest that it was contemplated that the railroad company should sell the granted lands

within a brief period. Purchasers had the right to rely upon the patents as showing that all the conditions annexed to the grant had been duly performed. The patents in question are genuine instruments, having a legal existence, within the meaning of

Moffat vs. *United States*, 112 U. S., 31.

They are, in a true sense, *bona fide* purchasers, and as such are entitled to the protection of a Court of Equity. That Court will not permit their rights to be destroyed or impaired by an attack upon the patent, under which they claim title, unless it be clearly shown that the patent is void, for reasons similar to that which is stated in the case above cited,—or was issued without authority of law.

United States vs. *Flint*, 4 Saw., 60.

IV.

The Map of 1864—Complainant's Exhibit A—Is the Map of the General Route of the Western Pacific Railroad.

The Pacific Railroad Act of 1862, Section 7, and the Act of 1864, Section 5, provide for the filing of a map which shall designate the *general route* of the road. The map of 1864 was filed, as we contend, and as the evidence conclusively shows, as the map of the general route, in accordance with the provisions of those sections.

No earlier map of the route is produced, and there are no indications that any was made; and as the Acts of Congress expressly require a map of the general route, the fact that all the officials of the General Government, from the Commissioners appointed by Section 4 of the Act of 1862, and Section 6 of the Act of 1864, up to the Secretary of the Treasury and the President, in the issue of the bonds of the United States and the patents for the lands, duly and regularly performed all the acts required by the Pacific Railroad Acts, leads to the conclusion that the map of 1864 is the map of the general route of the railroad. Those officers could not legally have performed many of those duties in the absence of such a map; and it will be presumed that one was filed. There is nothing on the face of the map tending to show that it is not the map of the general route, and it must therefore be regarded as such.

It is provided by Section 7 of the Act of 1862, as amended by

Section 4 of the Act of 1864, that upon the filing of the map of the general route of the road, the Secretary of the Interior shall cause the lands within 25 miles of "said designated route" to be withdrawn from pre-emption, private entry and sale. This map was filed December 8, 1864; the Secretary of the Interior, fifteen days thereafter, ordered the lands to be withdrawn within 25 miles of the route of the road, as indicated by that map—Respondents' Exhibit 16, Letter of Commissioner, December 23d, 1864. Had it been the map of definite location, no withdrawal of lands would have been ordered, or if ordered to be withdrawn, the lands would not have extended beyond the limits of 20 miles from the line of the road as definitely located. The only purposes of withdrawing lands within the limits of 25 instead of only 20 miles from the line of the general route, is to permit the Railroad Company to locate the definite line in the best position—to allow the Railroad Company to swing the line five miles on either side of the general route.

The inscriptions on the map of 1864 do not state whether it is the map of the general route, or of the definite location; but it presents on its face unmistakable evidence that it is the map of the general route. It passes through the middle of Stockton, and thence in a *straight line* to the western side of Sacramento. The road as constructed, as definitely located and built, leaves the easterly side of Stockton and runs thence to the extreme eastern side of Sacramento.

The road as constructed, instead of pursuing a straight line, diverges to the east, from two to three miles. (Stangroom's testimony, Record p. 149.)

The document made by the C. P. R. R. Co. of California in connection with and explanatory of the map of 1864, denominates it the map of the general route. (Complainant's Exhibit G. G. G.)

It will be remembered that the Central Pacific of California was formed for the purpose of constructing a railroad from Sacramento to the eastern boundaries of the State, and that document states that the map was prepared for the purpose of the assignment of the route from Sacramento to San Jose, to the Western Pacific R. R. Co.; and of the route from San Jose to San Francisco, to the San Francisco and San Jose R. R. Co.

The plaintiffs' Exhibit G. G. G. was sent, together with the map of 1864, as one act, and filed in the office of the Secretary of the Interior, and must be considered together, the one explanatory of

the other. The language of one of the resolutions in that document is as follows:

"It is hereby ordered and resolved by the Board of Directors of the said Central Pacific Railroad Company of California that the *general route* of the Western Division, from Sacramento to San Francisco, of the railroad and telegraph line of said Company, is hereby extended, located and fixed * * * * and which said line or route also appears by a reference to a map of the same, duly certified by the President and Secretary of this Company under the corporate seal of this Company, to be filed in the office of the Secretary of the Interior of the United States, under and in pursuance of said Acts of Congress." * * * *

The words relied upon by the complainants: "is hereby extended, located and fixed," must be read in connection with the words declaring it the map of the "general route;" and with the map itself, which shows on its face that it is the map of the general route, as indicated by the straight line between Sacramento and Stockton.

This document indicated the object of the filing of the map. The courses and distances mentioned in that document, show that the route as indicated therein, runs in a straight line from the city of Sacramento to the city of Stockton, which is not the line upon which the road was constructed. It will be observed that this map and document were filed within the time for designating the general route of said railroad, and filing a map of the same, as extended by the Act of 1864.

The Commissioner of the Land Office, in his letters to the local Land Office, denominates the map of 1864 as the map of the general route. (Respondents' Exhibit 16, and Complainant's Exhibit U. U.

The letter of Commissioner Edmunds, of December 23, 1864, to the Land office at San Francisco, says:

"I enclose, herewith, a map of the *general route* of the Western Division of the Central Pacific Railroad within your District."

Commissioner Edmunds, in his letter to the Marysville Land Office, of July 17, 1886, says:

"Until the route of said road is finally located, as provided in Section 7 of the Act of Congress of July 1, 1862, this office cannot undertake to determine the 20 mile limit to which the road will be restricted." * * *

He further says:

"On the 7th of December, 1864, a map showing the designated and *general route* of the Western Division of the Central Pacific R. R., from the city of Sacramento to the city of San Francisco, was filed with the Secretary of the Interior. A year and a half has elapsed and no definite location has been fixed by the Railroad Company."

This complaint of delay on the part of the Railroad Company is absolutely inconsistent with the position that the map of 1864, which was filed eighteen months before that time, was the map of definite location.

Commissioner Wilson, in his letter to the Marysville Land Office, of May 6, 1870, says:

"The Western Pacific R. R. Company, having filed a map of definite location of their line or route, I herewith transmit a diagram of said line, with the 20 mile limits of the land grant within your District, and you will be governed by this limit in the adjustment of the grant."

Those letters conclusively prove that the General Land Office regarded that map as the map of the general route, and in that regard agree with the resolutions of the Railroad Company. (Complainant's Exhibit G. G. G.)

Stangroom was the chief engineer of the Western Pacific R. R. Co. for two years next prior to June, 1867, and was well acquainted with all the work in the construction of the railroad; and he testifies that up to the time he resigned as engineer, the definite line of the road had not been run on the ground—that the stakes had not been set. (Record, p. 148)

The cases herein cited under point VI hold that the map of definite location must be accepted as such by the Secretary of the Interior. The map of 1864 was not accepted by the Secretary of the Interior as the map of the definite location of the line of the road. It was merely filed with the Secretary, but was not supplemented by anything in the nature of his approval as a map of definite location of the line of the road. Any one of the facts above mentioned would be sufficient to solve the doubt, if any existed, as to the character of that map; but all those facts combined lead irresistibly to the conclusion that the map was intended, made and received as the map of the general route of the road.

V.

The Map of 1870 is the Map of the Definite Location of the Line of the Railroad.

That map—Respondents' Exhibit 17—declares on its face that it is the map of the definite location of the line of the railroad.

The Secretary of the Interior, in his letter to the Commissioner, of date February 1st, 1870, the date of the filing of the map with the Secretary of the Interior, denominates it the map of the *definite location* of the line of the Road. (Respondents' Exhibit 16.)

The Commissioner of the General Land Office, in his letter of May 6, 1870, to the Register and Receiver at Marysville, mentioned the map of 1870 as the map of the *definite location* of the road. (Respondents' Exhibit 16.)

The map of 1870 was accepted by the Secretary of the Interior as the map of the definite location of the line of the road, and was ap- by him as such. See letter of Secretary of Interior to Commissioner of General Land Office, of date February 1st, 1870. (Respondents' Exhibit 16.)

The line of the road between Stockton and Sacramento was not surveyed on the ground until after June, 1867, and therefore the map of the definite location could not have been made before that date. (Stangroom's testimony, Record, p. 148.)

Stangroom, the chief engineer, testified that the road as constructed runs on the line laid down upon the map of 1870. He also testifies that it was impracticable to construct the road on the line of the map of 1864.

It is contended by the complaint that, as a patent was issued to the Western Pacific Railroad Company prior to the filing of the map of 1870, it is to be presumed that a map of definite location of the *whole road* had been filed before the issue of that patent. (Complainant's Exhibit S.)

We answer: The patent shows on its face that it was issued for land lying opposite the *first section* of the road running from San Jose.

The chief engineer of the Western Pacific Railroad Company certified under oath that the selections of land were within the twenty miles of the line as located and constructed—that is to say, the first section of twenty miles, which was the only section of the road which then had been constructed.

The law does not require that there shall be but one map of definite location, or that such map shall comprise the whole line of the road. The history of the construction of the Pacific railroads shows that all of the roads made definite locations of portions or sections of their lines from time to time, and that maps thereof were filed from time to time, and that thereupon patents for lands and bonds were issued accordingly, to the several railroad companies.

Section 7 and section 3 of the Act of 1862 uses this language: "When any *portion* of said route shall be finally located." And this shows that it was not contemplated that the final location of the whole line of the road should be made at one and the same time.

The provisions for the examination of the railroad by sections, when one or more sections should be completed, implies that final location might be made by sections.

The decision in *Butlz* vs. *N. P. R. Co.*, 119 U. S., 55, upholds the selection and patenting of lands based upon a map filed with the Secretary of the Interior for only a part of the road, and recognizes the right to make the definite location in sections or parts.

A map of the definite location of the first section of the road from San Jose will be presumed to have been filed before the patent above mentioned was issued. But whether such map was or was not filed, will not tend to show that further maps of definite location were not filed for the other sections, or the remaining portion of the road. The railroad company was not precluded from filing the map of the definite location of the line of the road between Stockton and Sacramento, or of the whole of the line of the road, because it failed —if it did fail— to file a map of the definite location of the first section of the road. The failure on the part of the railroad company or of the officials of the Land Department to comply strictly with the law in regard to the first section of the road, will not preclude them or either of them from a compliance with the law so far as it affects any other portion of the road, or preclude the railroad company from the enjoyment of the benefits accruing from such compliance.

But whether the first patents were or were not properly issued at that time, cannot affect this case, as none of the patents here involved were issued until after February 1st, 1870, when the map of the definite location of the whole line was filed with the Secretary of Interior.

It is further contended by complainants that the report of Stan-

groom, as chief engineer, made in December, 1865, tends to prove that a definite location had already been made before that time.

We answer: Stangroom calls it a preliminary survey. (Record, p. 163.) He says it was based upon a preliminary survey made by William J. Lewis in July or August, 1865. (Record, p. 158.) He says he did not consult the map of 1864 in the preparation of his report, because there were no field notes from which that map was made. The absence of field notes conclusively shows that the map of 1864 was not the map of definite location.

The report places the crossing of the Moquelumne River at Woodbridge, when in fact that town is two miles to the west of the line of definite location as the road is constructed. (Record, p. 159.)

The report runs the line through the middle of Stockton, and runs thence in a straight line to the western terminus of the road of the C. P. R. R. of Cal., at the Sacramento River—the western side of the city of Sacramento; but the line of the road, as constructed, runs through the eastern side of Stockton and diverges several miles to the east, and terminates at the American River, to the east of the city of Sacramento.

The counsel for the complainants rely upon the letter of Stanford, the President of the C. P. R. R. of Cal., as indicating that a map of the general route of the Western Pacific Railroad Company had been filed. This letter is dated February 20th, 1864. (Complainants' Exhibit, N. N. N.)

This letter was written prior to the passage of the Act of Congress of 1864, which gave largely increased subsidies to the Pacific railroads, and which, in all probability, induced the C. P. R. R. Co. of California to propose the extension of its line from Sacramento to San Francisco; but in truth that letter relates only to the line of the railroad running east from Sacramento to the eastern line of the State. The letter was written ten months prior to the filing of the map of 1864. It does not refer to the route between Sacramento and Stockton. His company were constructing the line running east from Sacramento. If a map which that letter refers to, did lay down the line running south and west from Sacramento, the complainants have it and should have produced it, instead of attempting to establish it by inference from a letter. Lands were withdrawn for the benefit of the road of the C. P. R. R. Co. of Cal., running east from Sacramento, and if that letter had any relation to that portion of the line

which was afterwards assigned to the W. P. R. R. Co., and if a map of the general route of the W. P. R. R. Co. had been filed, it is inconceivable that the Land Department should have confined the withdrawal of lands to the portion of the railroad extending east from Sacramento, and that it should not have also withdrawn the lands opposite the portion extending from Sacramento towards San Francisco—the portion which was afterwards assigned to the W. P. R. R. Co.

There are two exhibits in this case which are peculiarly significant in view of the facts we have stated—complainants' exhibit U and respondents' exhibit 16. The first is a letter from the Secretary of the Interior to the Commissioner, dated May 22d, 1869, instructing him to cease the issuance of patents to the W. P. R. R. Co., and to the San Francisco and San Jose R. R. Co., and without assigning any reason for the order. The portion of exhibit 16 to which we refer is the letter of February 1st, 1870, from the Secretary of the Interior to the Commissioner, transmitting map of 1870. The Secretary, after stating that he transmits with the letter the map, etc., which map is accepted and will be the basis for the adjustment of the grant, instructs the Commissioner that his order of March 22d, 1869, suspending the issuance of patents, is revoked.

The reason for this is apparent. It is that at the date of his first letter the map of definite location had not been filed, but that at the date of his second letter it had been filed.

We would also call to the attention of the Court the fact that the map of 1864 contains no certificate that the surveys of public lands connected with the line of the road are correct. The map of 1870 contains the proper certificate to this effect, verified by the proper officers of the railroad company.

It is further contended by the complainant that the filing of the map of 1864, in the offices of the Secretary of State of California, and of the several county clerks, constituted the map of 1864, the map of definite location.

We answer: The Pacific Railroad Acts do not require the filing of maps in any State office; nor do the rights of either of the parties to this action depend upon the compliance or non-compliance with any State law. The map of definite location becomes conclusively established as such, by being filed with the Secretary of the Interior, and by receiving his approval of the map, as the map of defi-

nite location, and in no other manner. A survey upon the ground does not constitute a definite location of the line of the road, so far as it relates to the power or duty of the government officials in issuing the bonds, or the patents for lands. The filing of the map with the Secretary of the Interior, and his approval thereof, as such map, constitute the only mode by which it becomes the map of the definite location of the line of the railroad. (See cases cited in point VI.)

We will mention a few other significant facts, which not only tend to show that the map of 1870 was the map of definite location, but also that the map of 1864 was the map of the general route.

The most eastern tracts of land involved in these actions are: W. ½ of Sections 5 and 17, T. 3 N., R. 10 E. W. ½ of Section 29, T. 4 N., R. 10 E.

These lands are just within the definite 20 mile limit of the railroad grant, as finally adjusted.

The 25 mile withdrawal limit extended from two to five miles further to the East. Compare complainants' Exhibit U. U. and T. T.

If the grant to the railroad had been adjusted upon the basis of the map of 1864, the eastern limit would have been fixed at the Moquelumne River, at the East line of Section 6 T. 4 N., R. 9 E., and at the Calaveras River upon the East line of Section 25 T. 3 N., R. 9 E. The land selected by the railroad company and patented by government, are from three to five miles east of where the 20 mile limit would have been, had the company intended, or the government treated, the map of 1864 as the map of definite location.

We repeat here what we said in relation to the map of 1864. Almost any of the facts above mentioned are sufficient to determine the character of this map; but all of those facts combined lead irresistibly to the conclusion that the map of 1870 was made and filed, and was approved by the Secretary of the Interior, as the map of the definite location of the line of the road.

VI.

The Title of the Railroad to Specific Parcels of Land, Attaches Upon Filing with the Secretary of the Interior the Map of Definite Location of the Line of the Road, and the Acceptance Thereof by the Secretary.

The following cases, in clear and unmistakable terms, sustain this position, and we know of no cases to the contrary:

Walden vs. *Knevals*, 114 U. S., 374;
Kansas Pac. vs. *Dunmeyer*, 113 U. S,, 629;
Van Wyck vs. *Knevals*, 106 U. S., 360;
Wood vs. *R. R. Co.*, 104 U. S., 329;
R. R. Co. vs. *Baldwin*, 103 U. S., 429;
Barry vs. *Winona R. R.*, 117 U. S., 232.

It is provided by Section 3 of the Act of 1862, as amended by Section 4 of the Act of 1864, that the alternate sections of land designated by odd numbers, within the limits of twenty miles on each side of the road, not sold, reserved, etc., at the time the line of the road is *definitely fixed*, shall be and hereby are granted to the railroad company.

It is said by the Court, in *Wood* vs. *R. R. Co.*:

"The line of the defendants' road was definitely located in June, 1875; the land, consisting of the alternate sections designated by odd numbers within a limit of twenty miles, was withdrawn from sale in July, following; and so much of it as had not been previously sold, reserved or otherwise disposed of, or to which a homestead or pre-emption claim had not attached, was thus appropriated to the satisfaction of the grant * * * * * * * * *. The grant was one *in praesenti*, and when the sections granted were ascertained, the title to the land took effect by relation, as of its date except as to the reservations named."

In *Van Wyck* vs. *Knevals*, the Court, after discussing the question as to the time when the line of the road becomes definitely fixed, says: "When that route is thus established, the grant takes effect upon the sections, by relation, as of the date of the Act of Congress. In that sense, we say that the grant is one *in praesenti*."

All of the other cases above cited sustain that doctrine, which is to the effect that the odd-numbered sections within the limits indicated, which, at the time of the definite location of the line of the road, were not subject to a pre-emption or homestead claim, and which had not been sold, reserved or otherwise disposed of by the United States, vested absolutely in the railroad company.

All these lands were, at the date of the filing of the map of 1870, public lands of the United States, and did not come within any of the saving clauses of the Act of 1862 or of the Act of 1864. We might, perhaps, with propriety, close the argument at this point.

The grants made by Congress to the railroad company are unquestionable. All the acts required by law to be performed by the railroad company, or by the officers of the Land Department, have been duly and fully performed. The map of the general route was filed in the General Land Office; the road was completed, and trains were regularly run over it in June, 1869, and thereafter the map of definite location was filed with the Secretary, and received his approval; and thereafter patents for the lands were issued to the railroad company. The bill of complaint alleges that the land was *sub judice* at the time of the filing of the map of the definite location of the line of the road, in 1864. The allegation of the bill that the map of definite location was filed in 1864, is fully disproved; and the allegation of the bill that the land was *sub judice*,—that is to say, reserved to satisfy the Moquelamos Grant when the map of definite location was filed--is fully disproved. On the contrary, the evidence clearly shows that the map of definite location was filed in 1870, and that at that date the lands were not in any sense *sub judice*. It is unnecessary to say that a complainant cannot recover unless the material allegations of his bill are sustained by the evidence. The complainant's case cannot be helped out by the allegations of the answers stating the true time of the filing of the map of definite location, and the proof adduced to support them. As the complainants have failed to support either of the above allegations, they must fail in this action. As we have heretofore stated, the only ground of attack upon the patent is, that the lands were *sub judice* at the time of the definite location of the line of the road.

The Circuit Court in its opinion in these cases, says: "But on the contrary, if the line of said road was not 'definitely fixed' within the meaning of the Act till after February 13th, 1865, then it is conceded that they ceased to be *sub judice* and they did pass to the railroad company, and they were properly patented." The complainants cannot substitute, in this Court, another ground of attack. The complainants having failed to sustain their ground of attack upon the patents, their action must be dismissed.

VII.

The Pretended Moquelamos Grant Covered only a Small Portion of the Lands in Controversy.

This question is not open to discussion, unless the Court, disagree-

ing with us, and our analysis of the testimony, should come to the conclusion that the map of 1864 was the map of definite location.

We would first remind the Court that this grant never had any real existence,—it was fraudulent and void.

R. C. Hopkins, who, for about twenty-five years was the keeper of the Spanish archives in the office of the Surveyor General of California, whose capacity is well recognized in all the Courts of California, and whose familiarity with the archives relating to land grants is superior to that of any other person in the State, testifies that this grant was antedated. (Record, p. 149.)

J. A. Forbes, who, for the last five years has been the keeper of those archives, who is very familiar with them and, like Mr. Hopkins, is well acquainted with the signatures of the Mexican officials in California, also states that this grant was antedated. (Record, p.——.)

Upon an examination of the record of proceedings in the Land Commission and the District Court, it will be noticed that no *deseno* was presented; and this fact tends to throw uncertainty upon the eastern boundary, and the alleged grant must be construed most strongly against the petitioner for confirmation.

We have no hesitation in saying that the Court will now strictly construe, as against the alleged grantees, the terms of such a fraudulent grant. No intendments will be indulged in in its favor.

The grant is referred to by Andreas Pico in his petition for confirmation, and is made by reference a part of the petition. The boundaries of the alleged grant, as translated into English from Spanish, are as follows:

"Eleven square leagues on the river Moquelamos, bordering on the North upon the southern shore of said river; on the East upon the adjacent range of mountains—the words of that call of the grant are as follows: *al oriente con la Sierra inmediata*—on the South upon the lands of Mr. Gulnak; and on the West upon the estuaries of the shore."

The line dividing ranges seven and eight East, is called the "Jack Tone road" by the witnesses in the case, because that road runs along or nearly adjacent to that line. Most of the lands in controversy are to the East of that road.

We contend, and think the evidence clearly shows, that the claim to this pretended grant did not extend beyond, nor indeed to within

about one mile to the West of, the Jack Tone road. During all the time that the proceedings for the confirmation of the pretended grant were pending, neither the claimants nor the officers of the Land Department regarded the eastern line of the pretended grant as being to the East of the Jack Tone road. The complainants now claim that the eastern line is about twenty miles to the East of the Jack Tone road. Between the Jack Tone road and the other boundaries mentioned in the grant, there is about twice as much land as would be required to satisfy the grant of the largest amount authorized by the colonization laws in force at the date of the alleged grant.

The Statute of the United States—10 U. S., Stats. 90-1—provide that "the authority hereby conferred on the Surveyor General, shall apply only to such unconfirmed cases as in the gradual extension of the lines of the public surveys which he shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected, and actually surveyed in advance of confirmation."

The section from which we have quoted provides for the survey of public lands, and requires him to survey up to the line of the unconfirmed grants. The surveys made by the Surveyor General under the authority of that Act, and the reservation from his surveys of lands *lying West* of the Jack Tone road, clearly indicate that he did not regard the bounds of that pretended claim as extending to the East of that road. His surveys were made up to, and not to the West of, the Jack Tone road, until long after the filing of the map of 1864, and the rejection of the claim to the Moquelamos grant; and the surveys were so suspended because of the claim to Pico.

In 1856, Andreas Pico appointed J. P. Brodie as his attorney in fact, with power to sell Pico's interest in the Moquelamos Grant. (Respondents' Exhibit 21, Record, p. 685.)

There was found, among the bundle of papers, belonging to the late Governor Stanley relating to the Moquelamos Grant, a map or diagram of the Moquelamos Rancho, prepared by J. P. Brodie while acting as the agent for Pico in the sale of his interest in the rancho. (Respondents' Exhibit 32, Record, p. ——.)

The handwriting of the inscriptions upon the map was fully proven; some of the inscriptions being in the handwriting of Governor Stanley, and some in that of his partner, Mr. King. That diagram places the eastern boundary of the rancho at some distance to the west of the Jack Tone road.

Pico refused to sell land within a mile west of the Jack Tone road. (Cole's testimony, Record, p. 225.)

Brodie, as Pico's agent, also refused to sell any lands within one mile to the west of the Jack Tone road.

The only evidence in contradiction of the last two facts above stated, is the testimony of Crawford and Talmadge, witnesses for the complainants. One of them testified that he found Brodie, in 1853, at a camp and a cattle corral in the mountains, many miles to the east of the Jack Tone road, and that Brodie offered to sell him lands in that vicinity as the land of Pico; and the other witness testified that Pico himself, about 1852 or 1853, offered to sell him lands to the east of that road; and the latter witness said that he was entirely unacquainted with the Spanish language and that Pico conversed with him in English. In contradiction of this evidence, we proved that Brodie came to California in 1854, and that his power of attorney from Pico was dated in 1856. We also proved by Messrs. Hopkins, Forbes, Moultrie and Barstow, that up to a time subsequent, by many years, to 1853, and indeed down to the time of his death, about 1870, Pico was unable to converse in English, and could utter only a few words in broken English. We also proved that many contracts of sale and deeds were made by Pico himself, or through Brodie, his agent, all of which were for lands to the west of the Jack Tone road; and the County Recorder testified that there were no conveyances of record from Pico for lands lying to the east of that road. Governor Edward Stanley became the attorney for the petitioner, Andreas Pico, soon after the proceedings for the confirmation of the claim were instituted. He was then a member of the law firm of Stanley & King, and afterwards, during his life, he was member of the firm of Stanley & Hayes. He had the active charge of the case for the petitioner. Although we were not able to produce a substitution in writing of Stanley, or of Stanley & King as the attorney or attorneys for the petitioner, it is proven by the testimony of Judge John A. Stanley, who was in his office for some years previous to the death of Governor Stanley, that he, Governor Stanley, was the attorney in that proceeding of Andreas Pico. That fact is also proven by testimony of Mr. Hopkins. (Record, p. 229.)

Papers were served upon him as such attorney. Letters were also written both by and to him as such attorney. In corroboration of our statement that he was in fact such attorney, we refer to Respondents' Exhibits from No. 1 to No. 13, inclusive, and to No. 33.

Stanley & Hayes, as the attorneys for the petitioner, in September, 1864, wrote a letter to the U. S. Surveyor-General for California, stating the eastern boundary of the claimed grant, and requesting that the lands to the west of that boundary be omitted from the surveys of public lands of the United States. (Respondents' Exhibit 9, p. 625); and thereupon the Surveyor-General ordered those lands to be reserved from the public surveys. (Respondents' Exhibit 19, Record, p. 674.)

We would also call attention to the significant fact, which is corroborated by the testimony of all the witnesses who speak in relation to the character of these lands, that nearly all of the lands to the west of Jack Tone road were level, rich and fertile valley land, while the lands to the east of that road are nearly all hilly, covered largely with timber and brush, and gradually ascending from that road up to the summit of the Sierra Nevada mountains, excepting such breaks or interruptions in the line of ascent as would naturally be caused by intervening streams. The lands to the east of that road were of little value as compared with the lands to the west; and it scarcely needs a suggestion that while the lands on both sides of the road were public and unoccupied, the petitioner for a grant would apply for the rich and valuable and level land rather than the broken and mountainous land.

The action on the part of the officials of the Land Department also shows that they did not regard the Moquelamos grant as extending on the east to the Jack Tone road.

The Surveyor-General was directed, both by the law and by the instructions from the Commissioners of the General Land Office, to survey the public lands up to the line of the Mexican Grant. Maps of T. 3, R. 8, and T. 4, R. 8, were filed in the local Land Offices at San Francisco and Marysville on December 5th, 1855, and were refiled in July, 1858, seven years prior to the rejection of the Moquelamos Grant. (Exhibits 23 and 24, Record, p. ——.)

See also Register McKenzie's testimony. (Record, p. 184.) The lands in those townships were ordered to be sold by the proclamation of the President, dated June 30th, 1858. (McKenzie's testimony, Record, p. 184.)

The Register certifies the amount of land sold in those townships prior to the rejection of the grant. (Respondents' Exhibit 25, Record, p. 682.)

This clearly shows that the Land Department did not regard the Moquelamos Grant as extending east of the Jack Tone road, the line dividing 7 and 8.

The alleged grant, as we have stated, was bounded on the south by the lands of Gulnak. It is stipluated in this case that the lands of Gulnak are the lands known as the French Camp Grant, or Rancho Campo de los Francesces. The *deseno* of that grant is Respondents' Exhibit 22. It is testified by Hopkins that it was made with unusual accuracy. It appears thereupon that the French Camp Rancho did not extend as far east as the Jack Tone road; and we claim as that rancho was made the southern boundary of the Moquelamos Ranch, the latter would not extend any further to the east than the former. Upon this point we can add nothing to the very cogent and clear statement presented by Judge Sawyer in his decision in the suit formerly mentioned, which was brought for the annulment of five out of seven of these patents.

See *United States* vs. *C. P. R. R. Co.*, 8 Saw., 81.

We think that the above facts fully substantiate our position that the Moquelamos Grant did not extend to the East of the Jack Tone road; and this position is in our view very materially strengthened by the testimony of witnesses who translate into English the call for the eastern boundary of the grant, and by the testimony of witnesses who have described the character of the land lying to the East of the Jack Tone road. The Spanish words for that call are "*al oriente con la sierra in mediata.*" The unquestionable meaning of the term Sierra is a range of mountains, and not a single mountain or mountain peak or summit. We claim that the call excludes the mountains from the grant,—that the grant extends only to the base of the mountains. It is difficult, if not impossible, in any case, to designate the place where the valley ends and the mountains begin. A range of mountains comprises not only summits or peaks, but also all the elevated, mountainous, hilly or broken land extending down to the valley. Much testimony was introduced in the case as to the correct translation of the term "*in mediata*" as used in the grant. Mr. Hopkins, whose familiarity with the Mexican archives has already been mentioned, translates the call as follows: "On the East with the contiguous *sierra.*" And he testifies that "*sierra inmediata*" means "contiguous *sierra*" or "*sierra* adjacent," and that the term

would exclude the Sierras,—the whole mountain range—from the grant. (Record, p. 253.)

Ramsey, who has lived for several years in Southern Mexico and Central America, and has been engaged in surveying lands, having calls substantially the same as this, testifies that the phrase does not fit an exact line—that "*inmidiata*" means "adjacent to" or "lying by;" and he says that he is acquainted with the topography of the country in the vicinity of the Jack Tone road, and that he would run the eastern line of the rancho near that road. (Record, p. 221.)

Cummins testifies that "*inmediata*" means "near," or "close by," or "contiguous," or "hard by;" and he says that "Sierra" means a range of mountains, and includes all the land from the summit down to the plain.

Very many witnesses were examined by the respective parties in regard to the topography of the country adjacent to and immediately East of the Jack Tone road.

Mr. Tucker is a civil engineer, of large experience, is thoroughly acquainted with the country involved, and has recently made a special and detailed examination of it. He describes the mountains as commencing a short distance East of the Jack Tone road; and that line is presented on Respondents' Exhibit 18. (Record, p. 144.) He describes the land East of that line as hilly, and says that the hills rise in elevation until the summit of the Sierra is reached, with casual breaks in the line. (Record, p. 144.)

Atherton, another civil engineer, testifies to the same effect.

Reed, another civil engineer, corroborates these witnesses with regard to the country along the line of the San Joaquin and S. V. R. R. (Record, p. 134.)

Washburn, Superintendent of that railroad company, testifies to the same effect. (Record, p. 130.)

Washington Tucker, a witness for complainants, fully corroborates the testimony of Tucker and Atherton. (Record, p.——.)

The testimony of these and other witnesses in respect to the facts we have just mentioned, is too voluminous to be reproduced in our brief; but it will be found that the record substantiates our statement of the substance of their testimony.

The complainants introduced in evidence several maps to show the eastern boundary of the pretended grant, which were made fourteen or more years after the rejection of the grant, and nine or more

years after the first of these patents were issued, the last of them having been made in 1882. (Complainants' Exhibits Z, A A, B B, C C, D D, and E E.) We objected to the introduction of each of them as incompetent and immaterial.

This was a manifest attempt on the part of the complainants to manufacture evidence for themselves. The Commission had no more power to order, nor the Surveyor-General to make, a survey of a rejected grant, or of our lands, after the issue of a patent therefor, than they would have of a section or township of land in Ohio, which was patented fifty years ago. There is no law authorizing such a survey.

If they had been offered in connection with the testimony of the several surveyors—had they been called as witnesses—we would have had the same opportunity to cross-examine such witnesses as they had to cross-examine our surveyors, Tucker and Atherton. The manifest disagreement among all the surveyors—if those maps were competent evidence—clearly shows the uncertainty of the eastern line of the pretended grant.

VIII.

Stale Claim.

If the claim did not become stale within the fifteen years ensuing the issue of the first patent, or within the nine years ensuing the patent issued in 1875, during which time the United States knew every fact relating to the matter in controversy,—most of which were its own acts—it will be of interest to persons purchasing lands from railroad companies, which are required by the law creating the grant, to sell the lands within three years from the date of their patents, to know when such claim as this will become stale. We cite the following cases as clear authorities upon this point:

U. S. vs. *Tichenor*, 8 Saw., 156;
U. S. vs. *Phelan*, 4 Saw., 58;
Manning vs. *San Jacinot*, 7 Saw., 430;
Badger vs. *Badger*, 2 Wall., 92;
Stearnes vs. *Page*, 7 How., 826;
Pratt vs. *Cal. M. Co.*, 9 Saw., 363;
Sullivan vs. *Portland*, 94 U. S., 811.

IX.

There is no Equity in the Bill.

The only ground of attack upon the patents is, as we have already stated, founded upon the hypothesis that the map of the definite location of the line of the road was filed December 8th, 1864, and that when it was so filed, the lands in controversy were *sub judice* and reserved to satisfy the claim of Pico to the Moquelamos Grant.

No fraud, accident or mistake is alleged, even inferentially; nor is any fact or matter of equitable cognizance averred in the bill. The complainant says, in effect: "With knowledge of all the facts relating to this land, and of the rights and claim thereto of the railroad company, the United States issued these patents; and now, without the presence of any other fact, except that the railroad company has sold and conveyed these lands to third parties—presumptively for valuable consideration—the United States demand the cancellation of the patents. We fail to see any equity in the demand."

But if it be considered that the bill states a case for equitable relief, we urge that they have failed to sustain their bill by proofs. They have not sustained their sole ground of attack. The lands were not *sub judice*, when the line of the railroad was "finally located"—definitely fixed. The lands lying East of the Jack Tone road, and those lying within one mile to the West of the road, were never *sub judice*. Upon this point the evidence is clear and convincing.

We are entitled, under the well recognized doctrine applicable to patents, to rely upon the presumption that all the proceedings relating to the issue of the patents were duly and legally had. It may not be necessary to remind the Court that in the issue of these patents, the Land Department constitutes a special tribunal, whose duty it is to find all the facts involved in the matter of the issuance of the patents. The Department must find, not only that the line of the railroad was definitely located, and that the lands are within the twenty mile limits from the line of the railroad, but also that the lands, in other respects, came within the terms of the grant. There is no fact which must exist as the basis for the issue of the patents, which the Land Department must not have found; and when found, its finding is conclusive, unless attacked on the ground of fraud, or of error or law.

Upon this proposition we invoke the authority of

Johnson vs. *Towsley*, 13 Wall., 72,

which has been fully affirmed in

Maxwell Land Grant Case, 121 U. S., 325;
Steele vs. *Smelting Co.*, 106 U. S., 447;
Smelting Co. vs. *Kemp*, 104 U. S., 636;
Ehrhardt vs. *Hogaboon*, 115 U. S., 67.

And many other cases.

We insist that the finding of the facts by the Land Department—whether the finding was actual or only presumptive—is conclusive here. No fraud or mistake is alleged, nor is any fact alleged which takes these cases out of the operation of the just and salutary doctrine of *Johnson* vs. *Towsley*. We insist that the Land Department has found every fact which was essential to the issue of the patents.

But if the Court, for any reason, be of the opinion that the actual or presumptive finding of the Land Department has not the conclusive effect for which we contend, then we claim the benefit of the doctrine of

Maxwell Land Grant Case, 121 U. S., 325,

to the effect that in an attempt to overthrow a title issued under such circumstances as this, the evidence against the title must not merely preponderate against the patent, but it must be "clear, unequivocal and convincing;" it must be such in quality and amount that it produces conviction. There is no room for doubt as to the regularity and correctness of all the acts on the part of the Railroad Company, nor as to the acts or determinations of the Land Department, from the date of the grant, up to the issue of the patents, except as to the ascertainment of the eastern boundary of the pretended Moquelamos grant. Had that been a grant, even of the most inchoate character, we affirm that no two surveyors, acting independently of each other, will or can agree as to the position of the eastern line. The line between the valley and the mountains, where the mountains descend to and into the valley, may be approximated, but cannot be defined. The Land Department, by approximation, fixed this eastern line near the Jack Tone road; and should this Court now reject that line, upon

the evidence in the record, the next case must necessarily present evidence differing in some respect from that which is now presented, and this Court may be required to establish a new line; and this may be repeated many times. But we urge that the action of the Land Department should not be set aside or disregarded, except upon evidence of the most convincing character.

As a consideration worthy of the attention of a Court of Equity, we would urge that the Government should be regarded as estopped to question those patents at this time.

The first of the patents was issued in 1870, and the seventh in 1881, which was subsequent to the commencement of the former action, already alluded to, for the annulment of five of the patents. The last patent rests upon the same basis as each and all of the prior five patents. The issue of a patent for the mere purpose of instituting proceedings to cancel it, would be absurd; and the purchasers from the Railroad Company might fairly and properly assume that the United States did not intend to question their validity, as they continued to issue patents for these lands after they had commenced an action to annul prior patents for the same class of lands.

The even-numbered sections to the east of the Jack Tone road were offered for sale, and a large number of the parcels were sold, and pre-emption and homestead entries were made and approved, and lands were listed to the State, and the lands were rated and sold, as Commissioner Edmunds says in his letter of July 17th, 1866, as double minimum lands, at $2.50 per acre. Those entries were made before the final rejection of the Moquelamos Grant, on February 13, 1865. If the odd-numbered sections were excluded from the grant to the Railroad Company because the lands were *sub judice*, the even-numbered sections were, for the same reason, excluded from the operation of the pre-emption, homestead and lieu-land laws; and if these patents shall be annulled, then the United States are in duty bound to institute suits to annul all the patents and lists, issued for the even-numbered sections within the 20 mile limits, and within what the United States *now* claim were the limits of the fraudulent Moquelamos Grant.

The records of the Land Office show that prior io the rejection of the Moquelamos Grant, 10,000 acres were selected by and listed to the State; 4,000 acres were sold at public sale; 3,000 acres were entered by private entry; 2,000 acres were entered by pre-emptions.

These were even-numbered sections, sold or listed at double minimum prices. (Respondents' Exhibit 25.)

Are the facts in this case of such a controlling and convincing character that the Court, as a Court of Equity, should overrule the findings of the Land Department, and subject all these sales to individuals and listings to the State, to actions for their cancellation?

It is contemplated by the Pacific Railroad Acts, as we have already said, that the Railroad Companies should sell the odd-numbered sections within three years after the title vested in the respective companies. Ought not the United States to be estopped to allege the invalidity of the patents, after the lapse of many years after the sales of the lands by the Railroad Companies, and without the discovery of any fact relating to the issue of the patents, of which the United States did not have knowledge, when the first of the series of patents was issued?

We respectfully submit that the decree of the Circuit Court, dismissing the bill, should be affirmed.

A. L. RHODES,
L. W. Elliott *Solicitor for Appellees.*

IN THE

Supreme Court of the United States.

UNITED STATES

v.

McLAUGHLIN ET AL.

No. 1027.

Additional Points and Authorities for the Defendants.

We insist that the point presented by the appellants—to the effect that the lands in controversy were *sub judice*, and, therefore, reserved at the date of the grant to the railroad company—will not be entertained by this court, because the bill does not attack the patents on that ground, and because the point was not made in the circuit court. In support of this contention we refer to the opinion of Judge Sawyer in this case (Record, p. 21), and to statements of counsel to this court.

But if it be held that this point may now be presented to this court, we claim the right to present points which we did not make in the court below.

IT DOES NOT APPEAR THAT THE DISTRICT COURT ACQUIRED JURISDICTION OF THE PROCEEDINGS FOR THE CONFIRMATION OF PICO'S CLAIM.

The confirmation of a claim of title to lands derived by

grant from Mexico is made in the exercise of political power.

Tamelling *v.* U. S., 93 U. S., 661.
Beard *v.* Federy, 3 Wall., 491.

By the act of 1851, to settle private land claims in California—9 U. S. Stats., 631—the political power creates a special tribunal, and also borrows existing tribunals to assist in the settlement of those claims.

The proceeding authorized by that act is a special proceeding or case. Tribunals and courts acquire and exercise jurisdiction in such special proceedings only in the mode provided in the act. They have no general jurisdiction of such proceedings, but authority for every act must be conferred by the law expressly, or by necessary implication.

The *exercise* of jurisdiction by the Board of Land Commissioners does not confer jurisdiction of a petition for confirmation, if it was not filed within the two years provided by section 13 of the act. Nor could the district court acquire the sort of appellate or *quasi* appellate jurisdiction created by the act, unless the proceedings were transferred in the mode provided by the act. Should this court take jurisdiction of an action in which the defendant had not been served with process, or did not appear, it is obvious that any other judgment than one of dismissal, would be void. No citation of authorities in support of this proposition is needed. All courts, whether of original or appellate jurisdiction, have power to dismiss actions or proceedings, of which they have no jurisdiction, either of the subject-matter or of the parties.

But the possession of this power does not tend to prove that the courts could in such actions or proceedings render judgments upon the merits. The power to dismiss resides in the appellate courts as a legal necessity, though not al-

ways logically deducible from the provisions of the law conferring jurisdiction.

Had a proceeding for confirmation of a Mexican grant been taken by appeal from the district to the circuit court under an assumed compliance with section 631 or 633 of the Revised Statutes, it could not be claimed that a decree of confirmation by the circuit court would have any validity, for it did not conform to the procedure provided by the act of 1851—to settle private land claims in California.

The 12th section of the act of 1852 (10 U. S. Stats, p. 99) provides that one transcript of the proceedings of the land commission shall be filed in the district court, and one with the Attorney-General; and that the claimant shall file with the district court, *within six months after the decision against him*, a notice that he intends to prosecute the appeal to the district court; and that the Attorney-General, if the decision be against the United States, must file a similar notice within six months *after receiving* the transcript.

It is alleged in the bill—Record, page 3, paragraph 2—that Pico appealed to the district court, June 11, 1855, from the decree of the Board of Land Commissioners rejecting his claim which was rendered October 3, 1854. The answer admits the fact as alleged (Record, p. 10.) The same fact is stated in the stipulation (Record, p. 50, paragraphs 9 and 10).

We therefore urge that the district court acquired no jurisdiction of that proceeding. The statute says—sec. 12 of act of 1852, above cited—that on failure to give the notice "the appeal shall be regarded as dismissed." That is the construction given in—

Newhall *v.* Sanger, 92 U. S., 764.

Yturbide *v.* U. S., 22 How., 290, and—

Villabolos *v.* U. S., 6 How., 87.

In the last cited case the court says that the provision is mandatory, and authorizes no discretion by the court in that regard.

Should it be urged that the filing of the transcript constitutes the appeal, and that the allegation of the bill and admission of the answer that an appeal to the district court was taken, establishes the fact that it was taken, then we say that, in order to retain the appeal and give the court jurisdiction to hear and determine the proceeding, the notice provided for by sec. 12 of the act of 1852 should have been filed. In the absence of an averment that the notice was given, jurisdiction in the district court is not averred. This is a fatal defect. The record is not silent on this point. On May 9, 1855—more than *seven months* after the decision of the board rejecting the claim of Pico—he gave a *notice* of *appeal.* (Record, p. 677).

And on June 11, 1855, more than *eight months* after the adverse decision, Pico presented to the district court his petition for a rehearing of his case on appeal (Record, p. 677).

We do not admit that either of the above documents amounted to a notice that he intended to prosecute the appeal; but if they, or either of them, be considered as a sufficient compliance with the requirements of the act as to the contents of the notice, we insist that they came too late to preserve the appeals; that the appeals, by the imperative words of section 12, "shall be regarded as dismissed." Seven or eight months had elapsed, after the decision, before the notice was given. If the law regarded the appeal as dismissed the court did not have jurisdiction to adjudicate the question of the validity of the claim, unless it can be said that the court has jurisdiction of a special proceeding because it exercises it.

THESE LANDS WERE NOT RESERVED AT THE DATE OF THE GRANT, NOR OF THE DEFINITE LOCATION OF THE ROAD.

It was held in Newhall *v.* Sanger (92 U. S., 761), by a divided court, that the lands in that case were reserved at both of the above dates. We have shown conclusively that the map of definite location of the portion of the route in question—between Stockton and Sacramento—was not filed with, or approved by the Secretary of the Interior until February 1, 1870, and that the stakes for the line were not set until after June, 1867, when the engineer resigned.

The court decided that case under a mistake of fact, to the effect that the map of 1864 was the map of definite location—the mistake being induced by the mistaken assumption of counsel. That map is conclusively shown in this case to be the map of the general route.

We would not question the decision had it been limited to the condition of the land, as being reserved, at the time of the definite location of the line of the road; for all of the cases we have cited under our 6th point, together with

Buttz *v.* N. Pacific, 119 U. S., 71,

the last case in this court on this point, which by some unaccountable oversight we omitted from our brief, hold that if the lands be *then* not sold, reserved, &c., they vest in the railroad company, as expressly provided for by sec. 3 of the Pacific R.R. act of 1862. All that the exigencies of that case required was the determination of the question whether lands which were *sub judice* at the time of the definite location of the road were reserved so as not to vest in the R.R. Company. Ryan *v.* Railroad (99 U. S., 385) seems to hold that that point was all that was decided in Newhall *v.* Sanger.

We contend that if the proposition that lands claimed under a Mexican grant, at the date of the Pacific R.R. act,

are not public lands, in such sense that they may vest in the R.R. Co. is the proposition that was decided in that case, it can have no application to the facts in this case.

This reservation is not dependent upon any express provision of the statute, but arises, if at all, only as an implication of law.

We contend that it does not arise, except in case of a *grant* by Mexico or Spain; and it arises only to give effect to the provisions of the act of 1851 to settle private land claims in California (9 U. S. Stats., 631).

The persons who may have their claims confirmed are those who claim "by virtue of any right or title derived from the Spanish or Mexican governments," (sec. 8). We employ the term *grant* as inclusive of all titles, whether legal or equitable, inchoate or imperfect—such titles as were entitled to confirmation under that act.

At the date of this alleged grant, no right or title to lands in California could be acquired from the Government except in pursuance of the colonization law of 1824 and the regulations of 1828 (U. S. *v.* Vallejo, 1 Black, 553), and such right or title was required to be evidenced by a grant. No right was acquired except by a grant.

A claim is not synonymous with grant, either perfect or inchoate.

If there be no grant there is nothing from which the implication of a reservation can spring.

It would seem to be as illogical and inadmissible to infer a reservation from the mere assertion of a claim without a grant, as it would be to imply a vendor's lien upon an assertion of sale of lands without a sale in fact.

If a grant is not essential to a reservation, then one fraudulent claim to all California, or a claim to a certain amount of land to be located within the exterior limits of California, would have reserved the whole State until the fraudulent claim had been finally disposed of.

The Yturbide claim, under the doctrine in controversy—it being of 400 square leagues, to be located in Upper California—reserved all the lands in the State that had not been granted by Spain or Mexico.

Yturbide *v.* U. S., 22 How., 290.

We would call attention to the large exterior bounds within which Fremont's and Sutter's claims were to be located—60 to 150 square leagues.

U. S. *v.* Fremont, 17 How., 542.

U. S. *v.* Sutter, 20 How., 171.

Had there been no grant in those cases, will it be contended that the law would imply a reservation of those vast areas?

Here there was no grant; the document was a mere forgery. The claimant produced from his pocket his petition; also a grant signed many years after Pio Pico had ceased to be the Governor; also the approval of the Department Assembly purporting to have been made at a date when it was not in session.

There was no deseño, no order of reference, no informe, no decree of concession, no possession of the land by the petitioner, no juridical possession, no archive evidence of the grant or anything relating to it, except a *false* certificate that the grant had been approved by the Departmental Assembly.

Will it be asserted that the law will create a reservation in support of a claim based upon such a fraud and forgery?

It was contended by us at the oral argument that the doctrine against which we are contending cuts off the right of way for the railroad, and for stations, depots, machine shops, &c. And it was suggested from the bench that in

respect to the right of way, &c., there was in the act no exception of lands reserved. We answer that the right of way is granted over the *public lands;* and the doctrine against which we are contending, is that a claim which existed at the date of the act of Congress, though not based upon any grant, though fraudulent in its inception and to its conclusion, changed the character of the land from public land to land of another character. If, by reason of that claim, it ceased to be public land, as unnecessarily held in that case, how can it be said that the act grants the right of way over it? If that baseless claim changed the lands to that undefinable character of lands—made them not public lands—then the Attorney-General, if not barred by the laches of the Government, and if he can succeed in these cases, ought promptly to bring actions to cancel all the patents issued to pre-emption and other purchasers, and the lists issued for lands selected by the State; for the lands were improperly patented or listed if the lands were not public lands. But if it be held that the law creates or interposes the reservation, in protection of Mexican *grants,* and not mere fraudulent claims, we and all others acquiring titles to these lands, believing them to have always been public lands, will be protected. We also rely with confidence upon the repeated declarations of this court, that the title passed by virtue of the Pacific R.R. acts if the lands were free from pre-emption claims, reservations, &c., at the time of the definite location of the line of the railroad.

Respectfully submitted.

A. L. RHODES AND
L. W. ELLIOTT,
Solicitors for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1892.

Nos. 15 and 16.

DEWITT, et al.,
Plaintiffs in Error,

vs.

McLAUGHLIN.

AND

[redacted], et al.,
Plaintiffs in Error,